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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 451

JEFF FORT,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

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PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Illinois Appellate Court, First District, entered in this case on January 18, 1968. Leave to appeal was denied by the Illinois Supreme Court on May 29, 1968. No petition for rehearing was filed.

OPINION BELOW.

The judgment of the Illinois Appellate Court, First District, is reported at 91 Ill. App. 2d 212, 234 N.E. 2d 384, (1968), and is set out in full as an appendix to this petition. The order denying leave to appeal is not reported.

THE RECORD.

A certified copy of the record below has been filed in this Court.

JURISDICTION.

This petition is presented for review of the judgment of the Illinois Appellate Court, First District, entered on January 18, 1968. Leave to appeal was denied on May 29, 1968. The jurisdiction of this Court is invoked under 28 United States Code Section 1257.

QUESTIONS PRESENTED.

1. Whether an Illinois Criminal Statute on resisting an arrest violates the Fourth Amendment because:

   a. the statute requires a citizen to submit to the use of unnecessary force by the police without opportunity to defend his person, even if the arrest is illegal or the force excessive, so as to proscribe protected (to be "secure in [one's] person . . . from unreasonable . . . seizure") conduct; and

   b. the statute lacks standards both for the police and the citizen as to whether conduct is illegal, whether the citizen is protecting himself or is affirmatively preventing an arrest, and as applied, permits police to use force in response to mere words which fall short of threat or even indicate clearly a refusal to cooperate with the police.

2. Whether a Citizen of the United States is denied the due process of law, guaranteed by the Fourteenth Amendment, when a reviewing court relies on facts not in the record and a statute not charged, where such facts and the said statute are critical to sustain the conviction.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Illinois Revised Statutes, (1965), Chapter 38:

§ 107-2

"A peace officer may arrest a person when:

(c) He has reasonable grounds to believe that the person is committing or has committed an offense . . ."

§ 7-5 (a)

"A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest."

§ 31-1

"A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500.00 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both."

§ 7-7 (a)

"A person is not authorized to use force to resist an arrest which he knows is being made . . . by a peace officer . . . even if he believes that the arrest is unlawful and the arrest in fact is unlawful."

§ 7-1

"A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force . . ."

United States Constitution:

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

Amendment XIV

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

In this case the defendant was convicted in The Municipal Division of the Circuit Court of Cook County, Illinois, on January 10, 1967 of resisting arrest(*) although the record shows that there was no basis for the underlying charges against him, and the only basis for the "resisting" charge was that he uttered a swear word of incredulity when the Officer told him he was under arrest, and that he managed to push back after he was grabbed and before he was manacled by the police. At a bench trial, the underlying charges were summarily dismissed when no evidence was offered by the State, and the trial court found the defendant guilty of resisting (R. Tr. 25-26);

> "The Court: This case, here, gentlemen, is a pure example of what can happen. The original reasons for the police officers arriving on the scene was discharged.
>
> This is the foundation of the Complaint . . . to decide whether the original arrest is legal or not.
>
> In my opinion, on the basis of the evidence, the officers' testimony . . . there was a definite resisting of arrest by Fort after he was told he was under arrest.
>
> Finding of guilty on resisting, in regard to Fort."

and concluded (R. Tr. 27):

> "Counsel, I feel that the Court has been very fair to the defendant in many instances, but we would be

(*) Illinois Revised Statutes, 1965, Chapter 38, Section 31-1.

doing a disservice to the community in this case if this defendant could walk out of this court feeling he could strike an officer, whether the arrest is legal or not.

I do not think a police officer has to be struck in a fight to make an arrest, whether the arrest is legal or not.

I will sentence Mr. Fort to 30 days in The House of Correction."

The Illinois Appellate Court, however, decided that the arrest was legal, in order to sustain the conviction, then relied on Sections 7-5(a) and 7-7(a)(*) neither of which was charged, that the defendant had resisted reasonable force used by the arresting officer. Leave to appeal was denied by the Illinois Supreme Court on May 29, 1968 and the defendant asks review by this court. The full sequence of events appears in the record as follows:

On June 24, 1966, two Chicago Police Officers, Sullivan and Kovacs, assisting in an investigation of a complaint of a theft of a shotgun (R. Tr. 6) saw five boys on the porch of an apartment building on the southside of Chicago (R. Tr. 6). When Hairston, one of the boys, saw the policemen, he came downstairs and said (R. Tr. 6) "What's wrong?" Without any showing of a warrant, or any reason appearing to excuse a warrant, Officer Sullivan told him (R. Tr. 7) "We have a charge that you were involved in a theft." In response to Sullivan's request, the other four boys, George Rose, Lamar Bell, Leroy Dean and the Defendant (R. Tr. 4), came down the stairs, Sullivan told the boys (R. Tr. 8) that he had been given the names of the de-

(*) Illinois Revised Statutes, 1965, Chapter 38.

fendant and Hairston, called for the other car in the investigation and went up on the porch and found a shotgun. It was not loaded (R. Tr. 16).

Although the complaining witness was brought to the scene (R. Tr. 8), there was no attempt to determine that the gun was the witness's property. Instead, Hairston, Rose and the defendant were arrested for theft, but those charges were dropped as the complaining witness did not appear, even though the witness was available from almost adjacent to the place where the defendants were arrested (R. Tr. 3, 5-6) (R. Tr. 2, 4). And since it would have been necessary to appear to claim the gun, it is questionable at best, whether the gun belonged to the witness at all.

The Officer testified (R. Tr. 9-10) that the gun was not in the possession of any of the boys, yet on this record the police charged defendant, and the four other boys, with "unlawful use of weapon." Later those charges were dismissed without objection by the State;

Officer Sullivan testified (R. Tr. 8):

". . . I then came downstairs and I stated that they were under arrest.

"Q. All right.

"A. At this time Mr. Fort stated 'Bullshit,' and I grabbed him, and he pushed me, and hit me, . . .

"Q. Were you struck by defendant Fort?

"A. In the shoulder, and it glanced off of my face."

Officer Kovacs testified (R. Tr. 16):

"Q. Who did you attempt to arrest here?

"A. When the struggle ensued after Officer Sullivan took hold of Jeff Fort, I came to his assistance and for our protection I attempted to put handcuffs on Jeff Fort to restrain him.

". . . I grabbed hold of George Rose and told him that he (R. Tr. 17) is under arrest, and he resisted by pushing back from me and we were going to handcuff him to subdue him.

"Q. You were going to handcuff him to subdue him. All right.

"A. Though I was struck from—it seemed like from behind, a glancing blow or a bump up against me. I turned around, and Eugene Hairston was there, and I took hold of him also and thus asking for a pair of handcuffs from one of the officers at the scene to handcuff him.

"Q. That was the basis of the charges against the others?

"A. Yes, resisting."

On these facts, Bell, Hairston, and defendant were charged with disorderly conduct (R. Tr. 2, 4) and Hairston, Rose, and defendant with resisting arrest (R. Tr. 2, 4). At the close of the evidence the trial court (R. Tr. 25) granted a motion to dismiss the disorderly conduct charges against all of the defendants and the Court said (R. Tr. 24):

> "As far as the evidence presented, from what the officers testified, would not find any of these four gentlemen guilty of resisting. The only individual where there was a question of resisting was Fort, from the testimony of Officer Sullivan."

In a hearing to set punishment, all that the State had to introduce against (R. Tr. 26) the defendant was an arrest record with no convictions:

"[The prosecutor]. Difficulty goes a long way back, Judge, the difficulties this man has had with the law.

"Strong arm robbery, was discharged.

"Reckless conduct. S.O.L. [Stricken with leave to reinstate].

"And a burglary that does not state what the rulings were, and an aggravated battery here.

"The other aggravating circumstances are inherent in the case itself, where the defendant did not submit to the authority of the police."

On this record, and although it is common knowledge that a simple resisting arrest conviction ordinarily rates a twenty-five dollar fine, the trial court sentenced defendant to serve thirty days in jail, and although the ordinary bond for a thirty day sentence is $500 to $1,000, the Appeal Bond in this case was set (R. Tr. 28) at $10,000.00.

In order to sustain the conviction, the Appellate Court found it necessary to embellish the facts and to rely on two sections of the Illinois Statutes not charged in the Complaint. (The Complaint appears at R. 3). The reviewing court "found" that the gun was stolen (App. 2a and 3a), to add some onus on the defendant; that the arrest occurred in a "tense situation" (App. 3a) and defendant's response was "abusive and defiant" (App. 3a). There was no showing that the defendants had an opportunity to or were even asked to get into the squad car peacefully, without being grabbed, that there was any tension until after the arrest, or that defendant's remark was or was understood by the police officers to be "abusive and defiant," and there was no showing either that the exclamation was anything but disbelief, or that the officers thought otherwise. And the Appellate Court found it necessary both to find that the arrest was legal and the force used justified, re-

lying on Sections 7-5(a) and 7-7(a) of Chapter 38 of the Illinois Revised Statutes. The Appellate Court affirmed and the Illinois Supreme Court denied leave to appeal.

Defendant asks this Court to grant review to determine whether the police had cause to grab the defendant, whether his verbal response gave them cause to physically seize him, whether he was entitled to respond in the limited way that he did, and finally, whether any standards exist as to resisting or self protection, under the Illinois Statute. Defendant also asks for review to determine whether it was proper for the Appellate Court to rely on facts not in the Record, and statutes not charged.

IMPORTANT CONSTITUTIONAL QUESTIONS INVOLVED AND CONFLICT WITH DECISIONS OF THIS COURT.

The Resisting Arrest Statute Conflicts with the Fourth Amendment.

This case raises the question of whether a criminal statute can prohibit a citizen from protecting his person from an illegal arrest or from the excessive or unnecessary force used by a police officer. This Court has not determined this question and it is raised squarely in this case.

The Fourth and Fourteenth Amendments to the United States Constitution protect the individual against unreasonable arrest. *United States* v. *Hall,* 348 F. 2d 837, Cert. denied 382 U.S. 947 (1965), *Wrightson* v. *United States,* 222 F. 2d 556 (1955), and in *Wright* v. *Georgia,* 373 U.S. 284, 292 (1963), this Court stated that there is no obligation to obey an unlawful police order and Illinois has said, *City* v. *Williams,* 45 Ill. App. 2d 327, 330-331, 195 N.E. 2d 425 (1963), "[There is] no obligation to obey . . . a police order if it is arbitrary and unreasonable." An illegal order does not become valid because it involved physically seizing a person, rather than verbally ordering him about. In this case, the police seized the defendant's person without even making any minimal efforts to confirm the validity of the complaint or to effect the arrest peacefully. There is nothing in the record to show that the force used was necessary or that force was even required. The only evidence indicates that the boys had cooperated and peacefully followed a police request to come off of the porch without any necessity for doing so. Thereafter, the

police officer announced indiscriminately that the whole group was under arrest, but he did not say what for. This was done even though there was never any suggestion of any participation in anything illegal by at least two of the boys. Why were all of the boys summarily placed under arrest?

The record shows that the police, before establishing any basis to do so, used physical force to take the defendant into custody. Yet the defendant's only action in response was a swear word of incredulity, and when grabbed, to push back once at the officer.

But trial judge believed that the Illinois Statute prohibits resistance to any kind of arrest, and that a citizen can be convicted under Section 31-1 whether the arrest is legal or illegal. If a citizen may not resist, may the police use unnecessary force? If they do, isn't it the police who are acting illegally? Justice Brandeis, dissenting in *Olmstead* v. *United States,* (1928), 277 U.S. 438, 485, 48 S. Ct. 564, 575 said:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Yet the trial court would have a defendant submit under any facts or circumstances. What is the effect of such a rule of law? Mayor John V. Lindsay in an address to the Lawyers Committee for Civil Rights under Law on May 20, 1968 stated:

"The continuing tragedy in our cities is that the administration of criminal justice is not working satisfactorily on a daily basis. Under entirely normal circumstances, the system dispenses mass justice and fails to deal properly with the individual. Yet in these same courts, hundreds of thousands of our less fortunate citizens first confront their government and first experience the application of that government's laws to them."

One step closer to the people are the police. Many hundred. of thousands of citizens first come into contact with their government through the police officers. The conduct and actions of the police in their day to day contacts with the people and their treatment of the people as individuals largely determines those citizens attitude toward law and order.

If the police use unnecessary or illegal force in dealing with people, the people will lose respect for law and order and violence becomes inevitable. The example of respect and peacefulness must just be set in the public sector.

Is it asking too much to ask the police to take certain minimal threshhold steps to determine the reasonableness of the arrest and the necessity for the use of force? Certainly force can and should be used when necessary, but this case is a classic example of what can happen when the police are quick to accuse and quick to use force. If the police had made a reasonable effort to determine the ownership of the gun, used force only if the defendant actually refused an order to come along peacefully and treated the defendant with the same respect persons of higher standing in the community are treated (See *People* v. *Rinehart*, (1967), 81 Ill. App. 2d 125, 225 N.E. 2d 486), most of the

trouble in this case could have been forestalled. The Illinois Resisting Statute denies citizens the right to be "secure in their person . . . from unreasonable . . . seizure."

The Illinois Resisting Statute Is Vague and Lacks Standards. In Addition, It Also Proscribes Conduct Protected by the Fourth Amendment.

The vagueness of the Illinois Resisting Statute is classically demonstrated in this case. First, because the trial judge convicted the Defendant under the resisting arrest Statute (Section 31-1) without regard to whether the police conduct was legal or not. Second, because the Illinois Appellate Court in order to justify the conviction under Section 31-1 found it necessary to expand that Section to include two other statutes, Section 7-5(a) and 7-7(a)(*) and found it necessary to misstate the facts, so as to add tension as a new element, as though existence of tension would have justified grabbing the defendant in this case. Third, because the trial court found defendant guilty, but at the same time on similar evidence did not find Rose and Hairston guilty. Fourth, because the only distinction between the facts as to this defendant and as to Rose and Hairston was that defendant spoke. Does the resisting arrest statute prohibit speaking? When does verbalizing become resisting? Was the defendant's remark "abusive and defiant," disbelief, or what? There is no showing what the tryer of fact found. In Illinois even foul swearing

(*) These Sections are each a nullity under Illinois law for failure to include a penalty, *People* v. *Graf*, 93 Ill. App. 2d 43, ... N.E. 2d ..... (1968).

is no cause for police action. *Civil Service Commission* v. *Oratowski,* 3 Ill. App. 2d 551, (1954). And can words be resistance when actual refusal to go with the police officer is not *People* v. *Rinehart,* 81 Ill. App. 2d 125, 225 N.E. 2d 486 (1967) (same court)? Is resistance an affirmative act? Is some threshhold effort to arrest without force required before a police officer can resort to force, particulaly when no overt acts other than words on the part of defendant are involved?

A police officer may not use force except to effect a legal arrest and then he may only use such force as is reasonably necessary to effect the arrest or protect his person. He has no power to use force when making an illegal arrest. However, a citizen cannot resist an illegal arrest. (Section 7-7(a)). When the police officer uses force without cause, or excessive force, what is the citizen to do? How shall he respond? The Appellate Court would agree with the prosecutor: "submit" to police authority. What if it hurts? If the citizen cannot use force in return, can he defend himself or ward off blows? New restrictions in personal freedom under "stop and frisk" do not extend to absolute submission, or to submission to force. The Illinois Resisting Statute is vague and unconstitutional and violates the Fourth Amendment.

The Defendant Was Denied Due Process of Law When the Appellate Court Relied on Facts Not in the Record and Statutes Not Charged in Order to Sustain the Conviction.

A trial judge cannot convict a man on the basis of assumptions which are materially untrue, *Townsend* v. *Burke,* 334 U.S. 736 (1948), accordingly, a reviewing court of necessity must be limited to facts in the record. Any assumptions of fact not in the record would

deprive the defendant and the prosecution of their rights to cross examine, redirect, and put on additional witnesses to prove or disprove such assumptions. These rights are basic and fundamental to due process.

There was a material denial of due process in the instant case because the Illinois Reviewing Courts in order to sustain the conviction of defendant by the trial judge relied on facts not in the record and two statutes not charged.

The only question passed upon by the Illinois reviewing courts was whether the force used by the police officers was necessary because they assumed without discussion that the arrest was lawful. The officers did not have a warrant, therefore the issue of the legality of the arrest and the necessity for force are both issues, particularly when the trial judge said he was finding defendant guilty of resisting arrest whether or not the arrest was legal or illegal (R. Tr. 27).

In the Appellate Court's statement of fact (App. 2a) the Court asserts that Officer Sullivan "found the stolen shotgun" when in fact he found a shotgun, and there is no evidence in the record at all to show that the gun found was stolen. In fact, the theft charge was dismissed without argument by the prosecution.

Although the complaining witness was brought to the scene (R. Tr. 8), there was no attempt to determine the ownership of the gun. Instead, Hairston, Rose and the defendant were charged with theft, but those charges were dropped because the complaining witness did not appear even though the witness was available from al-

most adjacent to the place where the defendants were arrested (R. Tr. 3, 5-6), (R. Tr. 2, 4). Since it would have been necessary for the complaining witness to appear to claim the gun, it is questionable at best, whether the gun belonged to the witness at all.

Misstating the record to the effect that the officers found the "stolen shotgun" eliminated the need to determine if the arrest was legal because a Police Officer who finds a stolen shotgun in a person's possession probably has sufficient grounds to arrest that person. However, even if the arrest was legal the defendant still had to know he was being arrested before he could resist. The Illinois Reviewing Courts assumed that he knew he was under arrest and summarily ignored that problem by stating "It is not necessary that the exact sequence of events be conclusively established in order to determine whether the defendant was guilty of resisting arrest." (App. 2a-3a).

The Illinois Reviewing Courts having assumed a legal arrest and resistance only considered whether or not the force used by the police officers was necessary and reasonable, concluding that it was for the following reasons:

1. *The police officers had located a stolen shotgun.*

This reason is materially false, there being no proof in the record that the shotgun was stolen, the theft charge being dismissed without argument by the prosecution.

2. *The arrest occurred in a tense situation.*

This reason was not proved by the record. There is no evidence of tension in the record, it was assumed by the Illinois Reviewing Courts from essentially the same facts used to show that force was necessary. Four armed policemen were trying to arrest five unarmed boys,

ordinarily, this is a very favorable situation for the policemen and nothing in the record changes the ordinary. There is no basis to say that tension was caused by the defendant and not by the police, or that if there was tension that gave cause to the police officer to grab the defendant.

3. *Defendant responded with his abusive and defiant remark, which unquestionably aggravated tension and gave police cause to believe force was necessary.*

This reason is also materially false. Officer Sullivan testified (R. Tr. 8):

> ". . . I then came downstairs and I stated that they were under arrest.
>
> "Q. All right.
>
> "A. At this time Mr. Fort stated 'Bullshit,' and I grabbed him, and he pushed me, and hit me, . . .
>
> "Q. Were you struck by defendant Fort?
>
> "A. In the shoulder, and it glanced off my face."

Officer Kovacs testified (R. Tr. 16):

> "Q. Who did you attempt to arrest here?
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> "A. When the struggle ensued after Officer Sullivan took hold of Jeff Fort, I came to his assistance and for our protection I attempted to put handcuffs on Jeff Fort to restrain him.
>
> ". . . I grabbed hold of George Ros and told him that he (R. Tr. 17) is under arrest, and he resisted by pushing back from me and we were going to handcuff him to subdue him.
>
> "Q. You were going to handcuff him to subdue him. All right.
>
> "A. Though I was struck from . . . it seemed like from behind, a glancing blow or a bump up

against me, I turned around, and Eugene Hairston was there, and I took hold of him also and thus asking for a pair of handcuffs from one of the officers at the scene to handcuff him.

"Q. That was the basis of the charges against the others?

"A. Yes, resisting."

The Illinois Reviewing Courts say the word "Bullshit" is slang, vulgar and has a contemptuous meaning, (App. 2a) citing Webster as authority. There is no evidence to support this and Webster's gives other preferred meanings. With all due respect to the Illinois Courts' understanding of human nature and vocabulary, this word in its ordinary usage simply does not have the connotation suggested. In the language of the streets it is equivalent to saying "nonsense" or "that's not true" or "you must be kidding" or "you're putting me on." More sophisticated synonyms are "Bull" and "Horsefeathers." It is not uncommon even in polite society to talk of one "shooting the bull." In the local atmosphere of a Negro slum the word "bullshit" has become a very common utilitarian word used by many people to express disbelief and denial.

Did the word "bullshit" aggravate tension? If so, why? A citizen of the United States has every right to be incredulous when a police officer comes and accuses him of a crime, a crime which he apparently did not commit. Police officers have no right to expect otherwise. Citizens may not resist arrest, but no law prohibits their denying their guilt lest it aggravate tension. In addition, the defendant testified that Officer Sullivan responded to his denial of knowledge of a shotgun by saying "don't give

me that bullshit" (R. Tr. 22). Obviously, the word is quite common in its usage and would not and should not have added to tension.

If the police officer became angry that anyone should have the nerve to dispute his arrest assertion, his anger is not justified and any increase in tension caused by the police officer's anger is not the defendant's fault. No one familiar with the language of the streets, as these officers undoubtedly were could reasonably believe that a statement of disbelief evidences an intent to resist arrest and therefore necessitates the grabbing and manacling of the defendant. The record is completely silent with respect to any other evidence that force was necessary. The police officer never asked the defendant to come to the station or the car, nor did the defendant ever refuse. The evidence of the police officer, taken as being true is that when defendant was told he was under arrest he said "Bullshit" and Officer Sullivan grabbed him and manacled him, but these facts do not support the court's assumption.

4. *Struggling and fighting ensued and four officers were required to restore order.*

The Illinois Courts were correct that struggling did ensue at some point during the investigation and arrest, but the record is quite ambiguous and contradictory as to when, what and how much happened. A reasonable interpretation is that defendant was protecting himself from an angry police officer, but even if struggling did ensue, what relevance has this to the question of the necessity for the original use of force? The question the court was answering was not whether force was used, it

admittedly was, but whether the force used was necessary to effect the arrest. If the force used was not necessary to effect the arrest, defendant cannot be found guilty of resisting, therefore the fact that fighting ensued is not a reason for an opinion that the force used was necessary.

Moreover, the Illinois Courts stated that four officers were required to restore order. Again a material misstatement of fact designed to show more trouble than there really was. The record is very clear that two of the officers remained away from the struggle. It can be assumed that they did not believe their help was needed. The Illinois Reviewing Courts erroneously and improperly misstated the facts in order to buttress an opinion that was already predicated on improper grounds.

5. *Anyway a citizen is not allowed to struggle.* (C. 38, 7-7(a), Ill. Rev. Stats. 1965).

The Illinois reviewing court's last reason is also irrelevant besides being a statute not charged. Section 7-7(a) of Chapter 38 of the Illinois Revised Statutes, on its face, prohibits citizens from resisting any kind of arrest. However, the statute does not give Police Officers the right to use unnecessary force. Once again, if the force used was not necessary, the defendant could not be guilty of resisting arrest.

None of the reasons stated by the Illinois Reviewing Courts support their conclusion that the force used to arrest the defendant was necessary.

The conviction therefore rests on facts not in the record and on a statute not charged, and the defendant was denied due process.

CONCLUSION.

For the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX

Opinion of the Illinois Appellate Court, First District, reported at 91 Ill. App. 2d 212 (1968).

January 18, 1968.

Obstructing Justice, § 1(*)—defense of right to defend against officer.

Where burglary suspect used slang and vulgar word having contemptuous and defiant connotation when police officers stated that he and four youthful companions were under arrest, and youths were then milling around officers, making it seem they were trying to take defendant from custody, reasonable cause to believe that force was required to maintain custody existed, and accused, who was subdued, was not entitled to defend charge of resisting or obstructing police officer on ground he was justified in defending himself (Ill. Rev. Stats. 1965, c. 38, § 7-5(a)).

Appeal from the Circuit Court of Cook County, Municipal Division; the Hon. HARRY G. COMERFORD, Judge, presiding. Judgment affirmed.

Marshall Patner and Alfred R. Lipton, of Chicago, for appellant.

John J. Stamos, State's Attorney of Cook County, of Chicago (Elmer C. Kissane and Barth H. Goldberg, Assistant State's Attorneys, of counsel), for appellee.

MR. JUSTICE SCHWARTZ delivered the opinion of the court.

The defendant was charged with the crime of resisting or obstructing a peace officer (Ill. Rev. Stats., c. 38, § 31-1 (1965)) and after a trial by the court he was found guilty and sentenced to serve thirty days in the House of Correction. He appeals and contends that the testimony of the arresting officer should be disregarded as self-

* See Callaghan's Illinois Digest, same topic and section number.

contradictory and that in any event he (the defendant) was justified in defending himself. The facts follow.

On June 24, 1966, Officers Sullivan and Kovacs of the Chicago Police Department were assigned to investigate the theft of a shotgun from 1422 East 67th Street, Chicago. After speaking to the victim, they set out to find Jeff Fort and one Gene Hairston who were allegedly involved in the theft. They found Fort, Hairston and three other youths sitting on a front porch at 1404 East Marquette Road, Chicago. They stopped their car in front of the building and were met by Hairston. They told him that they had a charge against him of involvement in the theft. Officer Sullivan directed the other men on the porch to come downstairs and when they did so, he told them of the nature of the investigation. Sullivan went upstairs, where the five young men had been, and found the stolen shotgun. He came down and informed all five men that they were under arrest. To this, the defendant replied, "Bullshit." That word, slang and vulgar, has a contemptuous and defiant connotation. (See Webster's Third New International Dictionary, unabridged, 1964.) The youths were milling around the officers when the defendant directed that abusive, defiant remark to Officer Sullivan. Officer Kovacs testified that it seemed to him they were trying to take Jeff Fort from custody. Sullivan grabbed the defendant, who pushed and struck him. Kovacs testified that he saw the defendant thrashing and kicking and swinging his arms and that he was subdued by Officer Sullivan only with his aid and the aid of two other officers who had been summoned to the scene.

Defendant argues that the police officer was not justified in grabbing him; that the officer's actions amounted to an unprovoked attack; and that under the circumstances he was privileged to repel the attack. In furtherance of this argument he emphasizes some contradictions in the testimony of Officer Sullivan, particularly as to whether the officer seized the defendant before or after being struck by him. It is not necessary that the exact

sequence of events be conclusively established in order to determine whether the defendant was guilty of resisting arrest. He admits struggling with the police, and we need only determine whether his physical resistance was in response to an unreasonable exercise of force by the officers.

The Criminal Code provides that:

> "A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest." (Ill. Rev. Stats., c. 38, § 7-5 (a) (1965).)

The arrest occurred in a tense situation. The officers had located a stolen shotgun and undertook to arrest five young men for the offense, when the defendant responded with his abusive and defiant remark. This unquestionably aggravated the tension and gave the police reasonable cause to believe that force was required to maintain custody of the defendant. Struggling and fighting ensued and four officers were required to restore order.

Arrests frequently are made under hazardous conditions and the peace is best preserved when the citizen submits to arrest without regard to the merits of the case. (See, c. 38, § 7-7 Ill. Rev. Stats., (1965).) Our courts have gone to great length to preserve the individual's right to an impartial trial and trial by combat has long been outlawed.

The defendant was proven guilty beyond a reasonable doubt and the conviction is affirmed.

Judgment affirmed.

DEMPSEY, P. J. and SULLIVAN, J., concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 451

JEFF FORT,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The judgment of the Illinois Appellate Court, First District, is reported at 91 Ill. App. 2d 212, 234 NE 2d 384 (1968), and is reprinted in Appendix F to this petition. The order denying leave to appeal by the Illinois Supreme Court is not reported.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) Is the right to be secure against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution violated by the Illinois Criminal Statute on Resisting or Obstructing a Peace Officer, Ill. Rev. Stat., 1967, ch. 38, §31-1 where:

(a) The statute only proscribes a citizen from knowingly resisting to authorized acts within a peace officer's official capacity and

(b) as such adequately sets forth the standards of conduct for a peace officer as well as a citizen of the United States?

(2) Is the right to the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution violated when a reviewing court makes a statement fairly inferred from the facts in the record and relies on a statute not as the basis for its opinion but as mere dictum?

STATEMENT

On June 24, 1966, one Ruby Jones filed a complaint alleging that Jeff Fort (and Eugene Hairston) obtained unauthorized control over her property, to wit: a 20-guage J. C. Higgins Shotgun, intending to deprive her of the use or benefit of said property in violation of Ill. Rev. Stats., 1967, ch. 38, §16-1 (theft) (See Appendix E.).

On the above date one John Sullivan, a police officer, was called to assist in the investigation of the theft which had taken place at 1422 East 67th St., Chicago, Ill. (Rep. of Pro. 6).

After a conversation with the complainant the officer toured the immediate area, and at 1404 East Marquette

Road the officer saw a group of young men sitting on a porch. (Rep. of Pro. 6). Gene Hairston (who lived at this address—Rep. of Pro. 12), alighted from the porch and asked Officer Sullivan and Officer Kovacs, "What's wrong?" To which Officer Sullivan replied that "he has a charge that you were involved in a theft" (Rep. of Pro. 7). The officer went on to say where the theft took place and that it was the theft of a shotgun (Rep. of Pro. 7).

The officers then requested that the rest of Hairston's friends (one of whom was the defendant Jeff Fort) come down from the porch, which they did (Rep. of Pro. 7). The officer, recognizing defendant Fort on sight, explained to him that they were given their names with reference to the theft and were in the process of investigating the theft. (Rep. of Pro. 8).

At this time Officer Sullivan called for the other squad that was also involved in the investigation and the complainant was brought to the scene (Rep. of Pro. 8). Immediately after certain statements were made by this citizen the officer proceeded up the stairs to the porch where the five young men (Hairston, Fort and 3 others) had been and he recovered a shotgun (Rep. of Pro. 8). Bringing the shotgun back downstairs with him he announced that Fort, Hairston and three others were all under arrest (Rep. of Pro. 8), as did Officer Kovacs (Rep. of Pro. 19). Immediately Jeff Fort said "Bullshit" (Rep. of Pro. 8). The officer commenced to take Fort into custody and Fort pushed him and hit him in the face and shoulder, two of the other young men tried to come on the arresting officer from behind (Rep. of Pro. 8).

Officer Kovacs testified that the four men were milling around and it seemed that they were trying to take Jeff Fort away from the custody of the officers (Rep. of Pro.

16). Officer Kovacs was struck from behind (Rep. of Pro. 12), and he described the situation as one of disorder (Rep. of Pro. 19).

Jeff Fort after swinging, thrashing, kicking and swinging his arms was finally subdued with the assistance of Officer Kovacs and the other two officers on the scene (Rep. of Pro. 8 and 20).

Jeff Fort testified that Officer Sullivan asked him where the shotgun was (Rep. of Pro. 22). Fort denied any knowledge of a shotgun (Rep. of Pro. 22).

On cross-examination, when Fort was asked if the officer had told him that he was under arrest, Fort replied, "He said you are all going to jail" (Rep. of Pro. 23). When asked further if by this did you think you were under arrest at that time, Fort replied, "When I saw that there wasn't nothing I could do but do what he said—I went with them." (Rep. of Pro. 23).

The theft charge against Jeff Fort was dismissed for want of prosecution, no complaining witness (Rep. of Pro. 4).

ARGUMENT

I.

THE ILLINOIS CRIMINAL STATUTE ON RESISTING OR OBSTRUCTING A PEACE OFFICER, ILL. REV. STATS. 1967, CH. 38, §31-1 DOES NOT IN ANY MANNER VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A.

The Statute Only Proscribes A Citizen From Knowingly Resisting To Authorized Acts Within A Peace Officer's Official Capacity.

Ill. Rev. Stats., 1967, ch 38, §31-1 is as follows:

> 31-1. § 31-1. Resisting or Obstructing a Peace Officer.] A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

Respondent respectfully directs this Honorable Court's attention to the case of Landry v. Daley, 280 F. Supp. 938 (1968). In this case the United States District Court, sitting as a three-judge federal district court upheld the constitutionality of Ill. Rev. Stats., 1967, ch. 38, §31-1; Resisting or Obstructing a Peace Officer.

A portion of that opinion which can be found at pages 959 and 960 is as follows:

> *The Resisting or Obstructing a Peace Officer Statute*
> Plaintiffs also contend that the Illinois "Resisting Arrest" statute, Ill. Rev. Stat., ch. 38, § 31-1, is void

both for reasons of vagueness and overbreadth. It provides:

> A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than a penitentiary not to exceed one year, or both.

This statute has likewise not been construed by the Illinois Courts. We must, therefore, again place our own construction upon it, giving the words their reasonable and natural construction.

[31, 32] This statute is designed to deter a person from resisting or interfering with the acts of law enforcement officials, simply on the basis of the person's own conclusion as to the impropriety of the act. It thus furthers the legitimate state interest in protecting peace officers, preventing frustration of the valid enforcement of the law, and promoting orderly and peaceful resolution of disputes.[77] It is obvious, therefore, that this statute is not directed at peaceful assembly. Its enforcement, at times, may conflict with assembly, but in such instances, the public interest in discouraging violence and insisting upon the use of peaceful methods of obtaining redress from unlawful acts outweighs the recognition of the feelings of the demonstrators.[78]

[33] The gist of the offense is "resisting" or "obstructing" the valid acts of a peace officer. These terms convey commonly recognized meanings. "Resisting" or "resistance" means "withstanding the force or effect of" or the "exertion of oneself to counteract

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77. Cf. Warner, The Uniform Arrest Act, 28 Va.L.Rev. 316 (1942).

78. Cf. Warner, supra note 77 at 330-31.

or defeat".[79] "Obstruct" means "to be or come in the way of."[80] These terms are alike in that they imply some physical act or exertion. Given a reasonable and natural construction, these terms do not proscribe mere argument with a policeman about the validity of an arrest or other police action, but proscribe only some physical act which imposes an obstacle which may impede, hinder, interrupt, prevent, or delay the performance of the officer's duties, such as going limp, forcefully resisting arrest or physically aiding a third party to avoid arrest.[81]

[34, 35] The statute further requires that the person resists or obstructs "knowingly" and that the officer be in the performance of an "authorized act within his official capacity." The term "knowingly" is specifically defined in the Criminal Code.[82] It considerably narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription. The term "authorized act," although not specifically defined in the Code, is not to obscure that men of common intelligence would differ as to its import. "Authorize" is defined as "to endow with authority or effective legal power, warrant, or right."[83] In the context of the statute the phrase "authorized act," given a reasonable and natural construction,

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79. Webster, New International Dictionary n. 1 & 2 (3d ed. 1964 Unabridged).

80. Webster, New International Dictionary n. 2 (3d ed. 1964 Unabridged).

81. Cf. In Re Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322, 333 (1st Dist. 1966).

82. See note 72 supra.

83. Webster, New International Dictionary n. 4 (3d ed. 1964 Unabridged).

means the legal or legally effective acts of an officer.[84] This phrase thus narrows the scope of the offense still further to include only resistance or obstruction of the legal acts of police and other officers.[85] For instance, resistance to an illegal search and seizure would not be proscribed.

[36] Nevertheless, plaintiffs contend that the statute permits police to exercise wholly arbitrary and capricious discretion in regard to group assemblies. Under the language of this statute, they argue, a peace officer need only decree on the spot that the most peaceful assembly be broken up and any failure on the part of a citizen to comply with such an order subjects him to the penalties of this statute. They contend that the *in terrorem* effect on the right of peaceful assembly arising from the potential misapplication of this statute requires, therefore, that it be declared unconstitutional.

This argument is unpersuasive for two reasons. First, the plaintiffs have not given the statute a reasonable construction. It does not proscribe resisting

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84. Cf. Ill. Rev. Stat. Ann. ch 38, § 31-1 (Smith-Hurd 1964) (Committee Comments). An analogous United States statute describing "Assault on a Process Server," 18 U.S.C. § 1501, has been similarly construed to prohibit only resistance or obstruction of a law officer while in the performance of a legally effective act. See, e. g., Sparks v. United States, 90 F. 2d 61 (6th Cir. 1937); Briggs v. United States, 24 F. 2d 961 (9th Cir. 1924).

85. There is an exception to this rule in another section of the Illinois Criminal Code. If the act which is resisted or obstructed is the making of an arrest, a private person is not authorized to resist such arrest with force even though he knows the arrest is unlawful. See Ill. Rev. Stat. ch. 38, § 7-7 (1967). See, also, Ill. Rev. Stat. Ann. ch 38, § 31-1 (Smith-Hurd 1964) (Smith-Hurd 1964) (Committee Comments).

or obstructing an unlawful act of a peace officer. The guilt or innocence of the defendant specifically depends on the validity of the officer's act. Therefore, if a policeman erroneously, capriciously, or arbitrarily orders peaceful demonstrators to disperse, acts of resistance or obstruction by the demonstrators would not subject them to criminal liability under this provision.

[37-39] Second, the basis of plaintiffs' argument is not the scope of the enactment, but its possible misapplication. The constitutionality of a statute, however, is not dependent on its susceptibility of misapplication. For every statute is susceptible of abuse, misuse of misapplication. Rather, its validity depends on whether the language of the statute, given its normal meaning, is so broad that it intrudes upon Constitutional rights.[86] If the language is so broad that its sanctions may be applied indiscriminately to constitutionally protected conduct, as well as to conduct which may properly be proscribed, it violates substantive due process and, therefore, is unconstitutional.

[40] The instant statute, however, does not contain such overreaching language. While admittedly, like any statute, it may be misapplied, its sanctions apply only to knowing physical resistance or obstruction of a valid act of a peace officer. These sanctions, therefore, do not ultimately depend on the subjective views of those charged with its enforcement. Consequently, we conclude that it is neither vague nor overbroad.

Petitioner attempts to construe the Illinois Statute on Resisting or Obstructing a Peace Officer under which he was properly convicted, in a manner inconsistent with the reasonable and natural construction of the words.

The Statute expressly provides through the use of the words resist and obstruct that a physical act or execution

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86. See authorities cited notes 41-43, supra and accompanying text.

is necessary. It was not the one foul and vulgar word which the defendant uttered which held him open for conviction under this Statute. It was that which followed, the pushing and hitting of the police (peace) officer (Rep. of Pro. 8).

The Statute further provides that the peace officer must be carrying out an authorized act within his official capacity. These words were more than adequately described and defined by the three-judge district court, sitting in the Landry case (supra).

Petitioner contends that defendant's acts of pushing and hitting the police officer were "justified" in view of the "unreasonableness" of the arrest and subsequent force used by the officer.

But who is best qualified to determine what is justified and what is unreasonable? Should it have been Jeff Fort that evening at 1404 East Marquette Road, Chicago, Illinois? Isn't it within the public's interest that the determination of what is justified and what is unreasonable be left to the courts of our land in a civilized manner?

The United States Constitution gives each citizen the right to bear arms, but does this prohibit the legislative branch of our government from enacting laws to control their use?

The United States Constitution grants freedom of speech. But does this entitle a citizen to "yell fire in a crowded theatre?"

Although petitioner questions only the constitutionality of §31-1, upon which his conviction was based, three corollary statutes are involved—Ill. Rev. Stats., 1967, ch. 38, §7-5, §7-7, and §107-2(c).

The officer in the case at bar received certain information from one Ruby L. Jones.[1] With this information the officer proceeded to tour the area in question, and at 1404 E. Marquette Road[2] saw Jeff Fort along with four other men sitting on a porch (Rep. of Pro. 6). The officer stopped his squad car and one man alighted from the porch and asked, "What's wrong?" (Rep. of Pro. 6). The officer stated, "We have a charge that you were involved in a theft" (Rep. of Pro. 7). The officer then told him where the theft took place and that it was a theft of a shotgun (Rep. of Pro. 7). At this time the officer told the rest of the men to come downstairs from the second floor (one of whom was Jeff Fort) (Rep. of Pro. 7). The officer told them that he had been given the names of Fort and Hairston and that he was in the process of investigation (Rep. of Pro. 8). After the complainant was brought over to where the officers were, Officer Sullivan proceeded up the stairs to where the five men had been (Rep. of Pro. 8). The officer finding a shotgun on the porch where the men had been a few seconds earlier came back downstairs and announced that "they were all under arrest" (Rep. of Pro. 8). Officer Sullivan went on to say that at this time Mr. Fort said, "Bullshit", and I grabbed him, and he pushed me and hit me and Officer Kovacs told me that two persons tried to come on me from behind (Rep. of Pro. 8).

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1. Ruby L. Jones on June 24, 1966, filed a complaint against Jeff Fort (Ind. No. 377629) for the theft of a shotgun from a store at 1422 E. 67th St., Chicago, Ill. The charge was thereafter dismissed for want of prosecution on January 10, 1967 because the complaining witness could not be found. (See Appendix E).

2. The distance between 1422 East 67th Street and 1404 E. Marquette Road is approximately one city block.

Officer Kovacs testified, "that after Officer Sullivan took hold of Jeff Fort, I came to his assistance and for our protection I attempted to put handcuffs on Jeff Fort to restrain him. With the milling of the other five gentlemen, it seemed to me that they were trying to take Jeff Fort away from our custody" (Rep. of Pro. 16).

On redirect, Officer Kovacs testified that he saw Jeff Fort swinging, and thrashing, kicking, swing his arms, when Officer [Sullivan] tried to handcuff him. Thus, under these circumstances two questions are raised, first, whether or not Officer Sullivan had reasonable grounds to believe that the five men had committed an offense, in which case he would be justified in placing all five men under arrest pursuant to Ill. Rev. Stats., 1967, ch. 38, §107-2(c), and second, whether or not it was reasonable for Officer Sullivan to grab hold of Jeff Fort?

Ill. Rev. Stats., 1967, ch. 38, §107-2(c) is as follows:

> § 107-2. Arrest by Peace Officer
>
> A peace officer may arrest a person when:
>
> (a) He has a warrant commanding that such person be arrested; or
>
> (b) He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another jurisdiction; or
>
> (c) He has reasonable grounds to believe that the person is committing or has committed an offense. 1963, Aug. 14, Laws 1963, p. 2836, § 107-2.

Since the decision in United States v. Rabinowitz, 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653, it has become an established principle that the premises where an arrest is validly made, under the control of the person arrested, are subject to search without a search warrant, and that

such search is not unreasonable within the prohibition of the United States Constitution.

An arrest without a warrant, such as occurred in this case, is lawful if a criminal offense has in fact been committed and the arresting officers has reasonable grounds for believing that the person to be arrested has committed it. Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327; People v. Fiorito, 19 Ill. 2d 246, 166 NE 2d 606; People v. LaBostrie, 14 Ill. 2d 617, 153 NE 2d 570.

The test is not whether there is sufficient evidence to convict the arrested man, but probable cause exists for arrest where a reasonable and prudent man having the knowledge possessed by the officer at the time of the arrest, would believe the defendant committed the offense. People v. LaBostrie, 14 Ill. 2d 617, 153 NE 2d 570; People v. McGowan, 415 Ill. 375, 114 NE 2d 407.

Furthermore, it cannot be said that an officer who has made an arrest loses his official capacity if the arrest is subsequently adjudged to be unlawful. Heliczer v. United States, 373 F. 2d 241, 245, cert. den. 87 S. Ct. 2133, 388 U.S. 917; United States v. Montanais, 362 F. 2d 527, 528.

See also Hodgdon v. United States, 365 F. 2d 679, cert. den., 87 S. Ct. 759, 385 U.S. 1029 where it was said that no one is entitled to resist with deadly force a U. S. Marshall operating under color of authority, even though it is later found that no actual authority existed. Therefore, under the circumstances thus described and with the knowledge Officer Sullivan thus possessed at the moment he announced the arrest of the five men, it can be said that Officer Sullivan had reasonable grounds to believe that the persons had committed an offense and that his arrests of these persons were lawful.

The second Statute previously mentioned is Ill. Rev. Stats., 1967, ch. 38, §7-5, which was presented to the Ill. App. Court in the State's Brief, is as follows:

§ 7-5. Peace Officer's Use of Force in Making Arrest

(a) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

(1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

(b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid. 1961, July 28, Laws 1961, p. 1983, §7-5.

The Statute expressly allows a police officer to use any force which he reasonably believes to be necessary to effect the arrest . . . and he need not retreat or desist from efforts

to make a lawful arrest because of resistance or threatened resistance to the arrest.

The second question then raised is whether it was reasonable for Officer Sullivan to grab hold of Jeff Fort. Can it be said that there was a threatened resistance when Jeff Fort answered Officer Sullivan's anouncement of arrest by saying "Bullshit?" Cn it be said that under the circumstances of a milling crowd of four other men and who another officer said "appeared to be trying to take Jeff Fort away from custody", that Officer Sullivan's act in grabbing Jeff Fort was unjustified?

The State unquestionably declares that the circumstances were such that a reasonable man could believe that a threatened resistance was being contemplated and that Officer Sullivan's act in grabbing the defendant was justified.

The third Statute previousy mentioned as a corollary to §31-1, namely §7-7 is as follows:

> §7-7. Private Person's Use of Force in Resisting Arrest
>
> (a) A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful. 1961, July 28, Laws 1961, p. 1983, §7-7.

Respondent respectfully directs this Honorable Court to the comments which follow the Statute in Smith-Hurd Anotated Statutes, 1967, and which are set forth as follows:

Committee Comments

Revised by Charles H. Bowman

Section 7—7 states a corollary to the justification acorded to an officer or deputy in using force to make an arrest, even if the arrest, without his knowledge, is unlawful: the person arrested is not privileged to resist the arrest with force. This provision is a deterrent to the resort to force by such a person, upon his own conclusion that the arrest is unlawful, in preference to the use of the methods provided by law for obtaining his release and redress for the unlawful arrest. (An extreme illustration of such resort to force appears in People v. Scalisi, 324 Ill. 131, 154 N.E. 715 (1926).) Such resort to force only invites the officer to use greater force to acomplish the arrest, which he believes to be lawful,—and the officer usually is the better prepared to use force. The public interest in discouraging violance and insisting upon the use of peaceable methods of obtaining release from unlawful arrest clearly outweighs the recognition of the feeling of the individual. (This was the view of the Uniform Arrest Act, § 6: see Warner, "The Uniform Arrest Act," 28 Va.L.Rev. 316 at 330, 331 (1942)).) While the rule as to resisting unlawful arrest usually is stated otherwise—for example, "to constitute the offense of resisting an officer, it must be shown that the process is legal," (See 1 Wharton's Criminal Law (12th ed.). § 853; Waite, "Some Inadequacies in the Law of Arrest," 29 Mich.L.Rev. 448 at 466 to 468 (1931); 3 ILP, "Assault and Battery," § 44; Wentworth v. People, 5 Ill. 550 (1843)—"It seems to be conceded, that if an officer, by virtue of a process against one person, offers to take into custody another, he may be resisted, and that the officer alone will be responsible." See also People v. Smith, 315 Ill. App. 671, 43 N.E. 2d 420 (1942).) The Supreme Court of Nebraska at one time suggested that an illegal arrest might be resisted, even to killing the arrestor: Simmerman v. State, 14 Neb. 568, 17 N.W. 115 (1883), commented

on in Note, 33 Neb.L.Rev. 451 at 453 (1954). A partial recognition of the inadvisability of sanctioning resistance in the case of an unlawful arrest appears in the rule that a person who kills an officer attempting an unlawful arrest is not justified, but is guilty of manslaughter rather than murder, in the absence of express malice. (1 Wharton's Criminal Law (12th ed.) §§ 542 and 853; 1 Bishop on Criminal Law (9th ed.), § 868, and 1 Bishop's New Criminal Procedure (2d ed.), § 162; People v. Doody, 34 Ill. 194, 175 N.E. 436 (1931); People v. Scalisi, 324 Ill. 131, 154 N.E. 715 (1926); Rafferty v. People, 69 Ill. 111 (1873) and 72 Ill. 37 (1874); People v. White, 33 Ill. 512, 165 N.E. 168 (1929); also People v. Brown, 288 Ill. 489, 123 N.E. 515 (1919), and People v. Smith, (1919), supra. Malice was found in People v. Davis, 412 Ill. 391, 107 N.E. 2d 607 (1952)—murder; and People v. Osborne, 278 Ill. 104, 115 N.E. 890 (1917)—assault with intent to murder.)

The provision applies only to the situation in which the alleged offender knows that the arrestor is a peace officer or private person summoned and directed to make the arrest (see People v. Lavac, 357 Ill. 554, 192 N.E. 568 (1934), in which the defendant, in his dwelling, fired through a closed door and killed two policemen in plain clothes, mistaking them for "hoodlums"; also People v. Doody, and People v. Brown, supra; and People v. Bissett, 246 Ill. 516, 92 N.E. 949 (1910). In People v. Davis, 412 Ill. 391, 107 N.E. 2d 607 (1952), the offender recognized the plain clothes policemen by their car. See 2 Bishop on Criminal Law (9th ed.), § 654, on the question of notice of official character), and it does not apply to the situation in which the officer uses excessive force: whether the arrest is lawful or unlawful, the officer's use of excessive force invokes the right of self-defense stated in section 7—1. (See People v. Doody and People v. Smith, supra.) The penalty for the offense of resisting arrest will be found in section 1—7(j) of this Code.

The Statute expressly forbids an individual from resisting an arrest by force even if he believes that the arrest is unlawful and the arrest in fact is unlawful. Again, this Statute is in furtherance of a peaceful solution to what a person may believe to be an unlawful arrest. The preference to the use of methods provided by law for obtaining release and redress for an unlawful arrest far outweighs the dangers which may be brought about by a self-interest, self-determination, spur of the moment decision, by an individual that an arrest is unlawful. Note Hodgdon v. United States (supra).

Petitioner alleges that a reasonable effort to determine the ownership of the gun should have been made (Appellant's Br. p. 14). Although the record does not yield much light on what efforts the police did take in trying to determine the ownership of the gun. It can fairly be said that the police officer did call for the other car investigating the incident which brought the complainant to the scene and that it wasn't until after certain statements were made by this citizen that Officer Sullivan proceeded to the porch where the men were standing and found the shotgun (Rep. of Pro. 8). It would appear that the officers did in fact make a reasonable effort before he proceeded further with his investigation and the subsequent arrests to determine the participants of the crime.

In summation, respondent has shown, (1) the constitutionality of Ill. Rev. Stats., 1967, ch. 38, §31-1 which defendant was found guilty of violating; (2) that the police officer's actions with the knowledge he possessed and the surrounding circumstances at the time of arrest were unquestionably appropriate; (3) that because the officer's acts were appropriate and the arrest legal, defendant could not lawfully resist, (4) that the defendant cannot be al-

lowed to be the judge in the determination of when an arrest is unlawful and when and to what extent he is allowed to use force in resisting this self-determined "unlawful arrest." (5) that under any circumstance, Ill. Rev. Stats., 1967, ch. 38, §31-1 is designed to deter a person from resisting or interfering with the acts of law enforcement officials, simply on the basis of the person's own conclusion as to the impropriety of the act. It thus furthers the legitimate state interest in protecting peace officers, preventing frustration of the valid enforcement of the law, and promoting orderly and peaceful resolutions of disputes (Landry v. Daley, 208 F. Supp. 938 (1968)).

B.

The Standards Set Forth In Ill. Rev. Stats., 1967, ch. 38, §31-1 are Neither Vague Nor Do They Proscribe Conduct Protected by The Fourth Amendment To The United States Constitution.

Petitioner's attempts to construe §31-1 as being unconstitutional, solely on the basis of the actions of the trial judge and petitioner's interpretation of the Illinois Appellate Court's decision.

Respondent has already pointed out the decision and interpretation of §31-1 by the District Court, sitting as a three-judge federal district court in the case of Landry v. Daley, 280 F. Supp. 938 (1968). That court upon full review of the Statute held that §31-1 was neither vague nor overbroad. Respondent can add nothing to that court's clear, reasonable and natural construction of the words in §31-1. As the Court in the Landry case held, the Statute does not proscribe to resistance to an illegal search and seizure, nor does it proscribe to resistance to

a policeman's erroneous, capricious or arbitrary orders (280 F. Supp. 938, 960).

Petitioner also mentions Ill. Rev. Stats., 1967, ch. 38, §7-5(9) and §7-7(a)[3], neither of which was defendant found in violation of. His conviction was based solely on violation of §31-1. The question therefore arises whether petitioner has grounds to question the constitutionality of either section? Furthermore, it is questionable whether petitioner even attempts to question their constitutionality since he speaks only of the Illinois Resisting Statute (§31-1) as being vague and in violation of the Fourth Amendment (Deft's. Br. p. 15).

The State will nevertheless state that both sections are constitutional for reasons previously mentioned.

Most of petitioner-defendant's allegations here have already been discussed. However, petitioner does make one allegation in his brief at this point, which although having nothing to do with the constitutionality of §31-1, is raised, and will be discussed by the State at this point. The allegation thus presented is to be found in defendant's brief on p. 15, namely, "that the Illinois Appellate Court found it necessary to expand §31-1 to include two other statutes, §7-5(a) and §7-7."

Ill. Rev. Stats., 1967, ch. 38, §7-5(a) was properly introduced by the State in its brief on appeal (See Appendix A) and was therefore properly incorporated in the decision by the Illinois Appellate Court. Since §31-1

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3. Neither of these sections are a nullity under Illinois law since the penalty for violation of these sections can be found in Ill. Rev. Stats., ch. 38, §1-7(j). Furthermore, the case of People v. Graf, 93 Ill. App. 2d 43, which petitioner cites, a dram shop case, is not on point.

proscribes resistance to the authorized acts of a peace officer it was necessary to determine if the grabbing of Jeff Fort by Officer Sullivan was a reasonable exercise of force and, therefore, an authorized act. To determine this it was necessary for the Illinois Appellate Court to look to §7-5 which had been properly presented to it on review in the State's brief. Therefore, the State does not understand what petitioner means when he says the "Appellate Court found it necessary to expand §31-1 to include §7-5." Since it was proper for the Illinois Appellate Court to refer to said section.

Ill. Rev. Stats., 1967, ch. 38, §7-7(a) was never made the basis of the decision by the Illinois Appellate Court. In passing the Court said:

> "Arrests frequently are made under hazardous conditions and the peace is best preserved when the citizen submits to arrest without regard to the merits of the case. (See, ch. 38, §7-7, Ill. Rev. Stats., (1965)). Our courts have gone to great length to preserve the individual's right to an impartial trial and trial by combat has long been outlawed."

The Appellate Court by reciting what is merely obiter dictum has done nothing to "expand" §31-1 as petitioner would have us believe.

Furthermore, since respondent has previously shown that the defendant knowingly resisted a lawful arrest, the performance of an authorized act, it would make it unnecessary to decide the constitutionality of §7-7. People v. Michael Birnbaum, —— Ill. 2d ——, No. 41324, 11/68 (Appendix D).

Finally, it is essential to the jurisdiction of the Supreme Court under 28 United States Code Section 1257 that a substantial federal question has been properly

raised in the state court proceedings. (Note the constitutionality of §31-1, §7-7 or §7-5 was never raised by petitioner in either his brief filed in the Illinois Appellate Court or in his petition for leave to appeal to the Illinois Supreme Court (See Appendx B & C).). This federal question must be more than a formal one. Since the issue as to the constitutionality of any of these statutes was never raised in the state court proceedings, it is not considered a substantial or proper basis for the granting of the petition. Zucht v. King. 260 U.S. 174.

II.

A CITIZEN OF THE UNITED STATES IS NOT DENIED THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT, WHEN A REVIEWING COURT MAKES A STATEMENT FAIRLY INFERRED FROM THE FACTS IN THE RECORD AND RELIES ON A STATUTE NOT AS THE BASIS FOR ITS OPINION BUT AS MERE DICTUM.

Petitioner sets forth five allegations in his second question presented to this honorable court, some of which the State has already answered.

Petitioner's first allegation "that the Appellate Court's assumption that the shotgun was stolen was unfounded and thus eliminated the need to determine if the arrest was legal," is without merit.

Respondent has already discussed the merits of the arrest made by Officer Sullivan and will not reiterate those facts at this time. However, the State will discuss briefly the "assumption" by the Appellate Court that the shotgun was stolen.

On June 29, 1966, Officer Sullivan was investigating the theft of a shotgun by Jeff Fort (See Appendix E). A shotgun was found in the immediate presence of where Jeff Fort had been sitting a few seconds earlier. All of this taking place with the owner of the shotgun being present at the scene where the shotgun and Jeff Fort were found. It would be a reasonable assumption that the shotgun found was that claimed to be stolen by Ruby Jones earlier that evening. This is especially true in view of Jeff Fort denying knowledge of the existence of a shotgun (Rep. of Pro. 22) which was found by the officer on the porch where Fort had been a few seconds earlier.

Nevertheless, in view of the fact that the arrest as previously described was legal, and in view of the fact that defendant was found guilty of resisting arrest and not of the theft of a shotgun, the statement by the Illinois Appellate Court in describing the shotgun as "stolen" was mere harmless error. When all of the above is contemplated it can readily be seen to be harmless error beyond a reasonable doubt. Chapman v. California, 386 U. S. 18 (1967).

Petitioner's second allegation that the statement by the Illinois Appellate Court in stating "that the arrest occurred in a tense situation was unfounded in that there was no evidence of tension in the record", is also without merit.

What better word could best describe a situation after Officer Sullivan announced that he was investigating the theft of a shotgun and that the complainant accused Fort and Hairston of the crime (Rep. of Pro. 7, 8), the finding of a shotgun on a porch where the five "boys" had been sitting a few seconds earlier, the statement by Jeff Fort of "Bullshit" in answer to the announcement of arrest

(Rep. of Pro. 8), the milling around of these five "boys" in what appeared to be an attempt to take Jeff Fort from custody (Rep. of Pro. 16), and finally, as one officer put it, a situation of disorder (Rep. of Pro. 19).

Our courts are not limited in using only those words which have been spoken during the course of trial in giving their opinion. Fair and reasonable inferences can be drawn from that which has been said and such is the case here. The word "tense" is a fair summation of the events which took place prior to, and at the time Officer Sullivan "grabbed" Jeff Fort.

Petitioner's third allegation can best be answered by a referral to Webster's Third New International Dictionery, unabridged, 1964 as well as to the surrounding circumstances just described in which the word "Bullshit" was uttered. That word under these circumstances has but one meaning, a contemptuous and defiant connotation.

Petitioner's fourth allegation is indeed interesting. Petitioner, on page 18, 19 of his brief states that,

> "Four armed policemen were trying to arrest five unarmed boys, ordinarily, this is a very favorable situation for the policemen and nothing in the record changes the ordinary."

On page 22 of petitioner's brief he states:

> "Moreover, the Illinois Courts stated that four officers were required to restore order. Again a material mistatement of fact designed to show more trouble than there really was. The record is very clear that two of the officers remained away from the struggle.

"In one instance petitioner denotes four armed policemen were trying to make an arrest and in other instances

denotes that two of the four officers remained away from the struggle."

The only evidence in the record as to the extent of participation by the other two officers in this arrest and the subsequent events can be found on pages 9 and 17. (Rep. of Pro. 9):

> "Q. Were you able to place him [Fort] under arrest?
>
> "A. [Officer Sullivan] Yes, with the assistance of Officer Kovacs and two officers on the scene" (Rep. of Pro. 9).

And on page 17:

> Q. You were going to handcuff him to subdue him. All right.
>
> A. (Officer Kovacs) Then I struck from—it seemed like from behind, a glancing blow or a bump up against me. I turned around, and Eugene Hairston was there, and I took hold of him also and thus asking for a pair of handcuffs from one of the other officers at the scene to handcuff him. (Rep. of Pro. 17).

Thus, it can be readily observed that there is no evidence that four armed policemen were trying to arrest five "unarmed" boys (Deft's Br. p. 18), but that there was evidence that four officers were required to restore order as the Illinois Appellate Court so stated in its opinion.

Furthermore, petitioner alleges that "the record is quite ambiguous and contradictory as to when, what, and how much struggling ensued" (Deft.'s Br. p. 21). He then goes on to say, "A reasonable interpretation is that defendant was protecting himself from an angry police officer. . . ." (Deft's. Br. p. 21).

Not only is the record clear as to the struggling that ensued but the record is equally clear that there is no evidence that there existed an "angry" police officer from whom the defendant was "protecting" himself.

There was no erroneous and improperly misstated facts by the Illinois Reviewing Court.

Petitioner's fifth and final allegation has already been discussed and will not again be reiterated.

Finally, as has been previously mentioned, since the issues that have heretofore been raised were never raised in the state court proceedings (Note especially, Petition for Leave to Appeal (Appendix C)), it is not considered a substantial or proper basis for the granting of the petition, Zucht v. King. 260 U.S. 174.

CONCLUSION

Respondent respectfully requests that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE

APPELLATE COURT OF ILLINOIS
First District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFF FORT, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Municipal Division. Honorable Harry G. Comerford, Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE

PEOPLE'S THEORIES

The defendant was proven guilty of resisting arrest beyond a reasonable doubt because of misconduct against police officers while such officers were investigating a theft.

POINTS AND AUTHORITIES

I.

THE EVIDENCE IS MORE THAN SUFFICIENT TO SUPPORT THE FINDING OF GUILTY BY THE TRIAL COURT WHICH, BEING THE TRIER OF THE FACTS, HAD THE DUTY TO DETERMINE CREDIBILITY OF WITNESSES AND THE WEIGHT OF THE TESTIMONY.

People v. Williams, 69 Ill. App. 2d 71;
People v. Mack, 25 Ill. 2d 416;
People v. Reaves, 24 Ill. 2d 380;
People v. Thomas, 18 Ill. 2d 439.

II.

THE DEFENDANT WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT.

Ill. Rev. Stat. Chap. 38, Sec. 12-3;
Ill. Rev. Stat. 1963, ch. 38, Sec. 7-5 (a);
People v. Lees, 60 Ill. App. 2d 254.

STATEMENT OF FACTS

On June 24, 1966, Officers Sullivan and Kovacs were assigned to investigate the theft of a shotgun from 1422 E. 67th Street. After speaking with the victim of the theft they toured the area in their police car looking for two men, Hairston and Fort. At 1404 E. Marquette Road, they saw a group of boys sitting on the porch of a building at that address. The officers stopped their car in front of the building and were met by Gene Hairston. They informed him that they had a charge against him alleging

that he was involved in a theft. Officer Sullivan, at this time told the other men on the porch to come downstairs. When they did, he informed them that they were investigating a theft. After calling for the original police car assigned to investigate this matter he went upstairs to where the five young men had been and found the stolen shotgun. When he came downstairs, he informed all five men that "you are under arrest." (Rec. 5, 6, 7, 8). Immediately, Jeff Fort, the defendant, said, "Bullshit", manifesting every intention and inclination to resist the arrest, necessitating Officer Sullivan to grab the defendant, reasonably believing such action was a requisite in view of his being surrounded by five men.

Officer Kovacs testified that it seemed to him as if they were trying to take Jeff Fort from their custody, in view of the milling around of the five defendants (Rec. 16). He further testified that when Officer Sullivan grabbed the defendant, that the defendant pushed and struck Officer Sullivan. Officer Kovacs stated that he saw the defendant swinging and thrashing, kicking, swinging his arms, and that he was subdued by Officer Sullivan only with his aid and the aid of two other officers at the scene who had previously been summoned (Rec. 15, 16, 17, 20).

Trial court dismissed charges against the four other boys but found defendant guilty of resisting arrest and sentenced him to serve thirty days in the house of correction.

ARGUMENT

I.

THE EVIDENCE IS MORE THAN SUFFICIENT TO SUPPORT THE FINDING OF GUILTY BY THE TRIAL COURT WHICH, BEING THE TRIER OF THE FACTS, HAD THE DUTY TO DETERMINE CREDIBILITY OF WITNESSES AND THE WEIGHT OF THE TESTIMONY.

The trial judge in this case was correct in believing Officer Sullivan and Officer Kovacs and disbelieving the defendant and he was performing his duty in making his decision, People v. Williams, 69 Ill. App. 2d 71 (No. 50907, p. 7); People v. Mack, 25 Ill. 2d 416, 422; People v. Reaves, 24 Ill. 2d 380, 382. Justice House in People v. Reaves at page 382 said:

> "It is the duty of the court in a bench trial to determine the credibility of the witnesses and the weight to be given to their testimony and unless the evidence is so improbable or unsatisfactory as to leave a reasonable doubt of defendant's guilt, the finding of the court will not be disturbed".

In the case at bar, counsel claims that the State's witness, Officer Sullivan's testimony is conflicting, and that the trial court erroneously selected and relied on one version of Sullivan's testimony without independent corroboration. He further claims that this action on the part of the Court was mere speculation, and therefore the Court should have disregarded Sullivan's testimony.

On page 8 of the record, Officer Sullivan was asked what he did after he recovered the shotgun. He testified that he came downstairs and stated to the men that they were under arrest. He further testified, "At this time Mr. Fort stated, "Bullshit", and I grabbed him, and he pushed me and hit me, and Officer Kovacs told me that two persons tried to come on me from behind." Officer Kovacs corroborated the testimony of Officer Sullivan when he testified on page 16, in the record that, "When the struggle ensued after Officer Sullivan took hold of Jeff Fort, I came to his assistance and for our protection I attempted to put handcuffs on Jeff Fort to restrain him. With the milling of the other 4 gentlemen, it seemed to me that they were trying to take Jeff Fort away from our custody."

However, counsel for defendant claims that Sullivan's testimony is contradicted because on page 13 of the record, Sullivan testified that Fort uttered certain words, swung at him and tried to move away when Sullivan tried to place him under arrest (Rec. 13). In addition, counsel also points out that Sullivan testified that the defendants were arrested on the porch, but later, on direct examination, testified about telling the defendants on the sidewalk that they were under arrest (Rec. 6, 8). Counsel further states that Sullivan did not attempt to explain or reconcile either of these discrepancies.

With regard to the question of where the men were arrested there is no discrepancy at all. It is clear, from the record, that the men were on the porch and called downstairs by Officer Sullivan and that after finding the shotgun on the porch, he informed all five men while they were downstairs on the sidewalk that they were under arrest.

Although defense counsel contends there is a discrepancy in the testimony of Officer Sullivan it is not suf-

ficient to warrant the court disregarding all of Sullivan's testimony as counsel proffers. Justice Schafer said in People v. Thomas, 18 Ill. 2d 439, 442, with reference to discrepancies in the testimony of witnesses:

> "It is for the trial court to weigh these variances in the light of all of the other testimony; they are by no means of such significance that he was required to hold the defendant's guilt was not proved beyond a reasonable doubt."

Courts of review have consistently recognized that the question of the weight of the evidence is for the trier of the facts who hears and sees the witness and is therefore in a better position to determine which witnesses are worthy of belief than is a court of review solely on the examination of the record. People v. Williams, 69 Ill. App. 2d 71; People v. Mack, 25 Ill. 2d 416.

Defense counsel's rule of rejecting contradictory testimony as cited in Grand Trunk R. Co. v. Hostein, 67 F. 2d 780; Johnston v. Cincinnati N. O. & T. P. Ry. Co., 240 S.W. 429, 436; Pritt v. Terminal R.R. Ass'n., 224 S.W. 2d 119, is clearly not applicable herein because they are civil cases and of no value with reference to the issue of credibility and weight of testimony.

II.

THE DEFENDANT WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT.

A person is guilty of resisting arrest when he knowingly resists or obstructs a peace officer in the performance of an authorized act. (Ill. Rev. Stat. Chap. 38, Sec. 31-1). Here, the evidence showed that the defendant, Jeff Fort, was "swinging and thrashing, kicking, swinging his arms,"

when Officers Sullivan and Kovacs tried to handcuff the defendant and restrain him. Defense contends that Officer Sullivan was not justified in grabbing the defendant to effect an arrest and that the defendant's pushing the officer and striking him was within the defendant's rights in order to protect himself.

The defense misconceives the law. The offense of resisting is proved by evidence which shows act of resistance. These resistive acts need not be successful in order to prove the crime. The testimony of the two officers was reasonable, and was believed by the trial judge who had an opportunity to observe the demeanor of the witnesses.

In the instant case, Officers Sullivan and Kovacs were investigating the theft of a shotgun. When they saw the five boys sitting on the porch at 1404 E. Marquette Road, they stopped their car to investigate. They had been given the names of Fort and Hairston by a citizen and after explaining the purpose of their investigation to Hairston who had come downstairs to meet them, the Officers asked the other men to come downstairs. Officer Sullivan then told all five men that they were in the process of certain investigation. Afterwards, he called for the other police car that was originally assigned to investigate the complaint.

Officer Sullivan then went upstairs to where the five men had been and discovered the stolen shotgun. When he came downstairs he informed all five men "You are under arrest" (Rec. 8). At this time Jeff Fort said "Bullshit", indicating he was resisting arrest and necessitating Officer Sullivan to grab him. Based on Officer Kovac's testimony, Sullivan's act was reasonable in view of the fact that it seemed as if the other four men were try-

ing to take Jeff Fort from Officer Sullivan's custody (Rec. 16).

Under the statute, a person is guilty of resisting arrest when he knowingly resists, or obstructs, the performance by one known to the person to be a peace officer of any authorized act within his official capacity. Based on Jeff Fort's acts it is obvious that his acts constitute a breach of the statute. As stated in the Ill. Rev. Stat. 1963, Ch. 38, Sec. 7-5 (a) "A peace officer, . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest." Counsel argues that swearing does not constitute resistance. However, when surrounded by five men it can safely be argued that the officer's act of immediately grabbing one of five men when he attempted to resist the announced arrest was not unreasonable. The evidence shows that the Officer was doing what he reasonably thought necessary to effectuate a lawful arrest. And, as stated in People v. Lees, 60 Ill. App. 2d 254, Police Officers are entitled to use force reasonably necessary to effect and sustain a lawful arrest and to subdue a person resisting arrest. And, significant, contra to Oratowski v. Civil Service Commission, 3 Ill. App. 2d 551 (1954) counsel makes no claim of injury to the defendant for there was none, Officer Sullivan having used only what force he felt was reasonable to effectuate his arrest.

CONCLUSION

The People of the State of Illinois respectfully request that the conviction of Jeff Fort be affirmed.

Respectfully submitted,

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APPENDIX B

No. 52142

IN THE

APPELLATE COURT OF ILLINOIS

First Judicial District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFF FORT, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Municipal Division. — Honorable Harry G. Comerford, Judge Presiding.

BRIEF AND ARGUMENT OF APPELLANT

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IN THE

APPELLATE COURT OF ILLINOIS

First Judicial District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFF FORT, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Municipal Division. — Honorable Harry G. Comerford, Judge Presiding.

NATURE OF THE CASE

The defendant was convicted of resisting arrest in a bench trial on January 10, 1967, before Judge Harry G. Comerford, in the Circuit Court of Cook County, First Municipal Division, and sentenced to serve thirty days in the House of Correction.

DEFENDANT'S THEORY OF THE CASE

The Court should reverse and order the defendant discharged as the State failed to meet its burden of proof because

1. The contradictory and conflicting testimony of the only witness on the question at issue should have been disregarded, or without corroboration, was not entitled to sufficient weight to support the conviction.

Alternatively,

2. The record, based on the State's own case, established self defense and not resistance to the arrest found by the court to have been illegal.

POINTS AND AUTHORITIES

I.

THE TESTIMONY OF THE STATE'S PRINCIPAL WITNESS WAS SELF-CONTRADICTORY, AND CONTRADICTED BY THE OTHER WITNESS FOR THE STATE, AND THE RECORD DOES NOT SUPPORT THE CONVICTION.

Grand Trunk R. Co. v. Hostein, 67 F. 2d 780 (6th Cir., 1933);

Johnston v. Cincinnati N. O. & T. P. Ry. Co., 240 S.W. 429 (Tenn., 1922);

Pritt v. Terminal R.R. Ass'n., 224 S.W. 2d 119 (Mo. 1949);

Cleary, Handbook of Illinois Evidence, Second Ed., 1963.

II.

TAKING THE STATE'S CASE IN ITS BEST LIGHT, THE RECORD SUPPORTS A FINDING THAT DEDEFENDANT WAS JUSTIFIED IN DEFENDING HIMSELF AND NOT THAT HE WAS RESISTING ARREST.

People v. Lees, 60 Ill. App. 2d 254 (1965);

Oratowski v. Civil Service Commission, 3 Ill. App. 2d 551 (1954);

39 American Jurisprudence 503;

Ch. 38, Sec. 31-1, Ill. Rev. Stat., 1965.

STATEMENT OF FACTS

In this case the trial court dismissed charges against defendant and four other boys, and found defendant guilty of resisting arrest. Charges of theft, unlawful use of a weapon, disorderly conduct against the defendant, and charges of theft, unlawful use of a weapon, disorderly conduct and resisting arrest against the other boys were dismissed when the State produced no evidence on the theft, unlawful use of a weapon, and disorderly conduct charges, and for insufficient evidence on the resisting arrest charges (R. 2, 21, 25).

Two Chicago police officers, Sullivan and Kovacs, arrived at 1404 East Marquette Road where they saw the five boys on the porch. When asked to come down, the boys did so (R. 6). Officer Sullivan then went upstairs and returned with a gun (R. 10). (There was no attempt to connect the gun to any of the boys, and no evidence presented on the unlawful use of a weapon charge).

Officer Sullivan testified for the state that when he told the boys that they were under arrest, the defendant swore once at which point the Officer grabbed the defendant and the defendant pushed and hit him (R. 8).

However, in cross-examination, Sullivan contradicted himself by testifying that Fort uttered certain words, swung at him and tried to move away when Sullivan tried to place him under arrest (R. 13). Sullivan also testified that the defendants were arrested on the porch, but later, on direct examination, testified about telling the defendants on the sidewalk that they were under arrest (R. 6, 8). Sullivan did not attempt to explain or reconcile either of these discrepancies.

Neither Sullivan nor Kovacs testified that defendant was told what to do or where to go after he was told he was under arrest.

Kovacs corroborated Sullivan that "(T)he struggle ensued after Officer Sullivan took hold of Jeff Fort" (R. 16). Kovacs testified that afterward there was a scuffle, and that he helped Sullivan handcuff the defendant (R.16).

Officer Kovacs testified that one of the boys, George Rose, tried to take Fort from their custody, and when Kovacs told Rose he was under arrest Rose resisted by pushing the Officer (R. 16, 17).

A motion for acquittal was denied. Defendant testified. He said that he was asked about the gun (R. 22). Following the sequence as related by the defendant, he was first struck and then told that he was going to jail (R. 22, 23).

The trial court found George Rose not guilty and found the defendant guilty of resisting arrest (R. 25, 26). No prior record of any conviction was introduced in aggravation (R. 26).

Solely on Officer Sullivan's testimony and with evidence only that he had previously been before the courts, the court sentenced defendant to thirty days in the House of Correction and commented that he had been very fair to the defendant in many instances (R. 27) without any support for this in the record.

Oral post trial motions in arrest of judgment and for a new trial were denied. Without any showing of a prior record or evidence that defendant would flee the jurisdiction, the Court set an appeal bond at $10,000 (R. 28). Defendant filed this appeal.

ARGUMENT

I.

THE TESTIMONY OF THE STATE'S PRINCIPAL WITNESS WAS SELF-CONTRADICTORY, AND CONTRADICTED BY THE OTHER WITNESS FOR THE STATE, AND THE RECORD DOES NOT SUPPORT THE CONVICTION.

The only testimony that defendant resisted arrest was from Officer Sullivan, but Officer Sullivan contradicted his own testimony on this issue, as well as to when the arrest occurred. Sullivan did not explain the contradiction, and the trial court erroneously selected and relied on one version of Sullivan's testimony without independent corroboration. This action on the part of the Court was mere speculation, and as this testimony proved nothing, the Court should have disregarded Sullivan's testimony, Grand Trunk R. Co. v. Holstein, 67 F. 2d 780 (6th Cir. 1933),

> . . . No jury should be permitted to draw a conclusion from the evidence when the proper conclusion to be drawn lies wholly within the realm of speculation and conjecture.
>
> If the plaintiff presents evidence of and relies upon one set of circumstances, and defendant presents evidence of and relies upon another, there is clearly a conflict of evidence, to be submitted to a jury. But if the evidence of both sets of circumstances is offered by the plaintiff, then we have in substance a situation identical with the one where several inferences may logically be drawn from the same set of circumstances. Under these conditions the jury should not be permitted to guess or speculate which set of circumstances it will accept. This principle has been well expressed

> by Mr. Chief Justice Taft, "when a party with the burden on him introduces evidence consistent with two different states of fact he proves neither."
>
> . . . The first set of circumstances negatives an inference of physical defect; the second can be accounted for upon no other ground. We cannot draw both inferences, but are simply left to speculate as to which should be adopted.

No Illinois case appears where testimony of one witness is self-contradictory. Prior inconsistent statements, if unexplained, are impeaching, Cleary, Handbook of Illinois Evidence, Second Ed. Sec. 9.7; its effect is to impair the credibility of the witness. And both Tennessee and Missouri have concluded that "(I)f proof of a fact lies wholly with one witness and he both affirms and denies it, and there is no explanation, it cannot stand other than unproven." Johnston v. Cincinnati N.O. & T. P. Ry. Co., 240 S.W. 429, 436 (Tenn. 1922). Also see Pritt v. Terminal R.R. Ass'n., 224 S.W. 2d 119, 123 (Mo. 1949).

The rule of rejecting contradictory testimony must be applied a fortiori in criminal cases where the defendant must be proven guilty beyond a reasonable doubt. This rule is clearly applicable where the sole prosecution witness is a police officer — man who is an expert in observing and reporting actions that he is involved in.

Officer Sullivan's testimony should be disregarded. Without that testimony there is no evidence to support the conviction.

II.

TAKING THE STATE'S CASE IN ITS BEST LIGHT, THE RECORD SUPPORTS A FINDING THAT DEDEFENDANT WAS JUSTIFIED IN DEFENDING HIMSELF AND NOT THAT HE WAS RESISTING ARREST.

Officer Kovacs corroborated Officer Sullivan and the defendant: Officer Sullivan grabbed the defendant, without showing that to do so was necessary to effect an arrest. Defendant pushed back once, and had a right to do so to protect himself without resisting arrest.

Officer Kovacs corroborated Sullivan's original testimony, the "struggle ensued after Officer Sullivan took hold of (defendant)" (R. 16). Sullivan testified only that defendant swore once "and I grabbed him, and he pushed me" (R. 10). Swearing once, vague, intemperate language, used without apparent purpose, does not constitute resistance, 39 Am. Jur. 508. However, the officer then grabbed the defendant although the defendant had not resisted the officer in any manner. Police officers are entitled to use force reasonably necessary to effect and sustain a lawful arrest and to subdue a person resisting arrest, People v. Lees, 60 Ill. App. 2d 254 (1965): however, the statute defines resisting arrest as resisting "the performance by . . . a police officer of any authorized act within his official capacity . . ." Ill. Rev. Stat., 1965, Ch. 38, Sec. 31-1, and the officer cannot cause the defendant to resist and then sustain a charge against him. See Oratowski v. Civil Service Commission, 3 Ill. App. 2d 551, 561 (1954) holding that swearing and gestures addressed to a police officer do not amount to a breach of the peace and that it is sworn duty and obligation of the officer not to breach

the peace and beyond this to conduct himself so as to keep others from so doing.

There was no threatening gesture to the officer. The defendant, arrested on charges that would later be dismissed, swore once at the officer, and the officer grabbed him. Yet previously, when the officer asked defendant to come downstairs he had done so. It was the officer's obligation to exercise a great degree of restraint, to avoid any breach of the peace, Oratowski, supra, at 561, yet he allowed defendant's swearing to arouse him, and when he grabbed the defendant without any order, either to follow him into the squad car or do some other act, the defendant had a right to protect himself from an unprovoked attack. The defendant, at that point, was not resisting an unlawful arrest, he was reacting to an unauthorized act of the police officer, and is permitted to do so under the statute. To hold to the contrary would be to violate defendant's right under the Fourth Amendment, and defendant is entitled to discharge.

CONCLUSION

For the reasons set out above defendant requests the Court to reverse the conviction.

Respectfully submitted,

MARSHALL PATNER AND
ALFRED R. LIPTON,
By: ALFRED R. LIPTON.

123 West Madison Street,
Chicago, Illinois 60602,
726-7058

APPENDIX C

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFF FORT, Defendant-Appellant.	No. ————

PETITION FOR LEAVE TO APPEAL

PRAYER FOR LEAVE TO APPEAL AND DATE JUDGMENT BECAME FINAL

Defendant, by counsel, petitions this Court for leave to appeal, pursuant to Rule 315 of the Rules of the Supreme Court of Illinois, from an order of the Appellate Court of Illinois, First District, affirming defendant's conviction of resisting arrest under Chapter 38, Sec. 31-1, Ill. Rev. Stat. 1965. The judgment was affirmed by the Appellate Court, 1st District, 3rd Division, on January 18, 1968. No petition for rehearing was filed.

POINTS PLAINTIFFS RELY ON FOR REVERSAL

1. The Appellate Court, First District, Third Division, erred in affirming defendant's conviction of resisting arrest where the only evidence to support proof of the offense beyond a reasonable doubt was the self-contradictory testimony of a single witness, the arresting officer.

2. The Appellate Court, First District, Third Division erred and is in conflict with the opinion in Oratowski v. Civil Service Commission, 3 Ill. App. 2d 551, 561 (First District, Second Division, 1954) by approving an arresting officer's use of force solely in response to defendant's cursing.

FACTS RELEVANT TO APPEAL

The facts relevant to this appeal are not fully stated in the opinion of the Appellate Court. The details of the incident leading to defendant's arrest, as found in the Record on Appeal, are: two policemen, Officers Sullivan and Kovacs, who were investigating the theft of a shotgun, saw defendant and four other youths sitting on an apartment-house porch. The officers did not have a warrant. They called the boys down to the street (R. 6) and one officer went up to the porch where he found a shotgun leaning against the railing. (R. 8) The boys were subsequently charged with theft, unlawful use of weapons, disorderly conduct and resisting arrest. Pending trial bond for the defendant was set at $10,000. At the trial all charges against the five boys were dismissed except for the resisting arrest charge of which only the defendant was convicted.

The only testimony relevant to the charge against defendant was given by Officer Sullivan and his testimony is self-contradictory. He first testified that when he approached the defendant and told him he was under arrest, the defendant swore at him, at which point the officer grabbed the defendant and defendant then pushed and hit him. (R. 8) However, on cross-examination Sullivan altered his testimony and said that he told the defendant he was under arrest, and the defendant then cursed, struck

at Sullivan and attempted to move away, before Sullivan grabbed him. (R. 13) In a second contradiction, Sullivan first testified that the defendants were arrested on the porch, (R. 6) but later testified that the defendants were arrested on the street. (R. 8) The witness did not attempt to explain or reconcile any of the self-contradictions and inconsistencies in his testimony. Yet the Court found defendant guilty of resisting arrest, beyond a reasonable doubt, on the basis of Sullivan's testimony, sentenced him to serve 30 days and over objection continued the bond in the amount of $10,000 for this appeal.

In the Appellate Court opinion affirming the conviction, the Court found contrary to the record that defendant and his four companions were in possession of a stolen shotgun. The Court by relying on this false assumption never reached the question of whether the self-contradictions and inconsistencies in the testimony of the arresting officer prove the defendant guilty beyond a reasonable doubt.

ARGUMENT

I.

WHOLLY UNEXPLAINED INCONSISTANT TESTIMONY BY THE ARRESTING OFFICER IS NOT PROOF BEYOND REASONABLE DOUBT.

Arresting Officer Sullivan provided the sole evidence of defendant's actions which allegedly constituted resisting arrest. As set out above in the statement of facts, he testified to two completely inconsistent sequences of events. Where two witnesses give self-contradictory testimony, Illinois law is clear that the trial court has primary responsibility for determining the credibility to be given each witness and in fact a court can balance the two stories and choose the most likely story on the basis of credibility. However, the central issue raised in the appeal to the Appellate Court and again to this Court is that only one witness testified that the witness was inconsistent on the question at issue, and therefore, the trial court had no reliable or rational way of resolving the inconsistencies in that witness's testimony.

The Appellate Court did not reach this question in affirming and attempted to avoid it by stating that it was unnecessary to determine the sequence of events in the incident leading to the resisting charge. Although this Court has never ruled on the issue, the Supreme Courts of other states have held that in cases of contradictory testimony by a single witness, neither the court nor a jury has a reliable basis to determine credibility and resolve self-contradictory testimony and that consequently all the testimony must be stricken. "If proof of a fact lies wholly with one witness and he both affirms it and denies it, and there is no explanation, it cannot stand other than un-

proven." Johnston v. Cincinnati N.O. and T.P. Ry. Co., 240 S.W. 429, 436, (Tenn. 1922); the policy behind rejection of such inconclusive testimony is clear: the court can only speculate as to the truth of any one part of it. This result is compelling in a criminal case—where the burden of the proof is high.

Sullivan did not attempt to explain the contradiction, and the trial court erroneously selected and relied on one version of Sullivan's testimony without any independent corroboration. This action on the part of the Court was mere speculation; the testimony should have been wholly disregarded. This principle is well set out in Grand Trunk R. Co. v. Holstein, 67 F. 2d 780 (6th Cir. 1933):

> . . . No jury should be permitted to draw a conclusion from the evidence when the proper conclusion to be drawn lies wholly within the realm of speculation and conjecture.
>
> If the plaintiff presents evidence of and relies upon one set of circumstances, and defendant presents evidence of and relies upon another, there is clearly a conflict of evidence, to be submitted to a jury. But if the evidence of both sets of circumstances is offered by the plaintiff, then we have in substance a situation identical with the one where several inferences may logically be drawn from the same set of circumstances. Under these conditions the jury should not be permitted to guess or speculate which set of circumstances it will accept. This principle has been well expressed by Mr. Chief Justice Taft, "when a party with the burden on him introduces evidence consistent with two different states of fact he proves neither."
>
> . . . The first set of circumstances negatives an inference of physical defect; the second can be accounted for upon no other ground. We cannot draw both inferences, but are simply left to speculate as to which should be adopted.

See also Pritt v. Terminal R. R. Ass'n., 244 S.W. 2d 119, 123 (No. 1949).

This evidentiary rule of rejecting self-contradictory testimony of a single witness in the absence of explanation developed in civil cases where the plaintiff only carries a burden of clear and convincing proof. It applies a fortiori in criminal cases where the State's burden is proof beyond a reasonable doubt. In this particular case where the sole prosecution witness to the crucial details of the alleged resistance was a police officer experienced in such incidents and in relating them, the self-contradictory testimony clearly should have been disregarded. It was not entitled to any weight. Without that testimony, there is no evidence to support the conviction.

II.

THE USE OF PHYSICAL FORCE IN MAKING AN ARREST SOLELY BECAUSE OF THE DEFENDANT'S LANGUAGE IS AN UNAUTHORIZED ACT BY AN ARRESTING OFFICER.

By statute, resisting arrest is defined as resisting "the performance by . . . a police officer of any authorized act within his official capacity . . ." Ch. 38, Sec. 31-1, Ill. Rev. Stat. (1965). The record in this case shows that the arresting officer physically grabbed the defendant solely because defendant said 'Bullshit' when arrested, and that the defendant's struggle in reaction to the grabbing resulted in his conviction for resisting arrest. Affirming a conviction of resisting arrest in this case conflicts with the opinion of the Appellate Court, First District, Second Division, Oratowski v. Civil Service Commission, 3 Ill. App. 2d 551, 561, which held that cursing and harsh words

by a defendant do not justify the use of force by arresting officers. "It is the sworn duty and obligation of the officer not to breach the peace and beyond this to conduct himself so as to keep others from so doing." (Oratowski at p. 561)

CONCLUSION

Defendant petitions for leave to appeal to this Court and prays that the judgment of the Appellate Court be reversed.

Respectfully submitted,

Marshall Patner, Alfred R. Lipton,
and Leslie R. Seeligson,
Attorneys for Defendant

By Leslie R. Seeligson

123 West Madison Street
Chicago, Illinois 60602
ST 2-8908

NOTICE AND PROOF OF SERVICE

TO: John Stamos
State's Attorney
Criminal Courts Building
2600 South California
Chicago, Illinois

PLEASE TAKE NOTICE that today this 14th day of March, 1968 I am filing with the Clerk of the Supreme Court of Illinois the attached Petition for Leave to Appeal and am sending you by mail a true copy thereof.

Leslie R. Seeligson

No. 52142

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFF FORT, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Municipal Division.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The defendant was charged with the crime of resisting or obstructing a peace officer (Ill. Rev. Stat., ch. 38, §31-1 (1965)) and after a trial by the court he was found guilty and sentenced to serve thirty days in the House of Correction. He appeals and contends that the testimony of the arresting officer should be disregarded as self-contradictory and that in any event he (the defendant) was justified in defending himself. The facts follow.

On June 24, 1966, Officers Sullivan and Kovacs of the Chicago Police Department were assigned to investigate the theft of a shotgun from 1422 East 67th Street, Chicago. After speaking to the victim, they set out to find Jeff Fort and one Gene Hairston who were allegedly involved in the theft. They found Fort, Hairston and three other youths sitting on a front porch at 1404 East Marquette Road, Chicago. They stopped their car in front of the building and were met by Hairston. They told him that they had a charge against him of involvement in the theft. Officer Sullivan directed the other men on the porch to come downstairs and when they did so, he told them of

the nature of the investigation. Sullivan went upstairs, where the five young men had been, and found the stolen shotgun. He came down and informed all five men that they were under arrest. To this, the defendant replied, "Bullshit." That word, slang and vulgar, has a contemptuous and definant connotation. (See Webster's Third New International Dictionary, unabridged, 1964.) The youths were milling around the officers when the defendant directed that abusive, defiant remark to Officer Sullivan. Officer Kovacs testified that it seemed to him they were trying to take Jeff Fort from custody. Sullivan grabbed the defendant, who pushed and struck him. Kovacs testified that he saw the defendant thrashing and kicking and swinging his arms and that he was subdued by Officer Sullivan only with his aid and the aid of two other officers who had been summoned to the scene.

Defendant argues that the police officer was not justified in grabbing him; that the officer's actions amounted to an unprovoked attack; and that under the circumstances he was privileged to repel the attack. In furtherance of this argument he emphasizes some contradictions in the testimony of Officer Sullivan, particularly as to whether the officer seized the defendant before or after being struck by him. It is not necessary that the exact sequence of events be conclusively established in order to determine whether the defendant was guilty of resisting arrest. He admits struggling with the police, and we need only determine whether his physical resistance was in response to an unreasonable exercise of force by the officers.

The Criminal Code provides that:

> "A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified

> in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest." (Ill. Rev. Stat., ch. 38, §7-5(a) (1965).)

The arrest occurred in a tense situation. The officers had located a stolen shotgun and undertook to arrest five young men for the offense, when the defendant responded with his abusive and defiant remark. This unquestionably aggravated the tension and gave the police reasonable cause to believe that force was required to maintain custody of the defendant. Struggling and fighting ensued and four officers were required to restore order.

Arrests frequently are made under hazardous conditions and the peace is best preserved when the citizen submits to arrest without regard to the merits of the case. (See, Ch. 38, §7-7 Ill. Rev. Stat., (1965).) Our courts have gone to great length to preserve the individual's right to an impartial trial and trial by combat has long been outlawed.

The defendant was proven guilty beyond a reasonable doubt and the conviction is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P. J. and SULLIVAN, J. concur.

APPENDIX D

Docket No. 41324—Agenda 29—September, 1968.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. MICHAEL BIRNBAUM, Appellant.

Mr. Justice House delivered the opinion of the court:

The defendant, Michael Birnbaum, was arrested while parading with a placard and passing out pamphlets in front of the Criminal Court Building in Chicago. A complaint was filed charging that the defendant unlawfully resisted the arrest. After a bench trial in the circuit court of Cook County, the defendant was found guilty and fined $100. He now appeals, alleging that the arresting officer acted without authority, that the arrest was therefore unlawful and that his constitutional right to resist an unlawful arrest was violated by the trial court's finding.

On October 24, 1967, Robert Craer, the Chief Deputy Sheriff of the Criminal Court Division, was stationed at the Criminal Court Building in Chicago. About 12 o'clock noon he saw the defendant distributing pamphlets in front of the building. Craer told the defendant that he should move away from the building and not stand in one place. About 1:30 P.M. Craer again saw him on the main sidewalk, stopping people. Craer again told him that he would have to leave. Later that same day, about 2:15 P.M., the defendant was standing in the entrance of the building. Craer called his attention to the rules regarding loitering that were posted inside the building. Subsequently, about 3:30 P.M., Craer asked the defendant whether he had read the rules. The defendant said he had but that they had no meaning for him. Craer then told the defendant that he was being arrested for violating circuit court rule "seven" relating to public loitering and interfering. The defendant resisted the

arrest, but he was subdued by Caer and another police officer.

The defendant argues that the trial court's construction of section 31—1 of the Criminal Code (Ill. Rev. Stat. 1967, chap. 38, par. 31—1) was unconstitutional. It reads: "A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institutional other than the penitentiary not to exceed one year, or both." The trial court stated in substance that a person cannot knowingly and forcefully resist an arrest by a police office even if the arrest is unlawful. This statement is suppoted by section 7—7 of the Criminal Code (Ill. Rev. Stat. 1967, chap. 38, par. 7—7) which provides: "A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful."

When Office Craer sought to make the arrest on the steps of the Criminal Court Building, he was acting under the authority of a valid rule of the circuit court. The defendant was told the basis for the arrest and then knowingly resisted. The defendant clearly violated section 31—1.

Although the trial judge stated that even an unauthorized arrest could not be resisted forcefully, this observation is not relevant to the facts of this case or to the decision rendered. The record contains undisputed evidence that the defendant knowingly resisted a lawful arrest, the performance of an authorized act, which makes it unnecessary to decide the constitutionality of section 7—7.

The judgment of the circuit court of Cook County is, accordingly, affirmed.

Judgment affirmed.

APPENDIX E

JOSEPH J. McDONOUGH, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

Court Branch 42, July 8, 19666 Misdemeanor

THE CIRCUIT COURT OF COOK COUNTY

STATE OF ILLINOIS } SS.
COUNTY OF COOK }

The People of the State of Illinois, Plaintiff,
Jeff Fort, Defendant. } No. 377629

COMPLAINT

Ruby Jones, complainant, now appears before The Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that Jeff Fort has, on or about 24 June 66 at 1522 E. 67th St., committed the offense of theft in that he obtained unauthorized control over the property of Ruby Jones, to-wit a 20 gauge J. C. Higgins shotgun valued under $150, intending to deprive the said Ruby Jones permanently of the use or benefit of said property in violation of Chapter 38, Section 16-1A1, Illinois Revised Statute and against the peace and dignity of the people of the State of Illinois.

Ruby Jones
1522 E. 67th St., 363-9280
Ruby Jones

STATE OF ILLINOIS } SS.
COUNTY OF COOK }

being first duly sworn, on June 24, 1966 oath, deposes and says that she has read the foregoing complaint by her and that the same is true.

Ruby Jones

Subscribed and sworn to before me ....., 19..

Joseph Jim Doyle,

I have examined the above complaint and the person presenting the same and have heard evidence thereon, and am satisfied that there is probably cause for filing same. Leave is given to file complaint. Warrant issued.

Bail Fixed at $10,000

APPENDIX F

PEOPLE v. FORT

91 Ill App2d 212

People of the State of Illinois, Plaintiff-Appellee, v. Jeff Fort, Defendant-Appellant.

Gen No. 52,142.

First District, Third Division.

January 18, 1968.

Obstructing Justice, § 1*—defense of right to defend against officer.

Where burglary suspect used slang and vulgar word having contemptuous and defiant connotation when police officers stated that he and four youthful companions were under arrest, and youths were then milling around officers, making it seem they were trying to take defendant from custody, reasonable cause to believe that force was required to maintain custody existed, and accused, who was subdued, was not entitled to defend charge of resisting or obstructing police officer on ground he was justified in defending himself (Ill. Rev. Stats. 1965, c. 38, § 7-5(a)).

Appeal from the Circuit Court of Cook County, Municipal Division; the Hon. Harry G. Comerford, Judge, presiding. Judgment affirmed.

Marshall Patner and Alfred R. Lipton, of Chicago, for appellant.

---

* See Callaghan's Illinois Digest, same topic and section number.

John J. Stamos, State's Attorney of Cook County, of Chicago (Elmer C. Kissane and Barth H. Goldberg, Assistant State's Attorneys, of counsel), for appellee.

MR. JUSTICE SCHWARTZ delivered the opinion of the court.

The defendant was charged with the crime of resisting or obstructing a peace officer (Ill. Rev. Stats., c. 38, § 31-1 (1965)) and after a trial by the court he was found guilty and sentenced to serve thirty days in the House of Correction. He appeals and contends that the testimony of the arresting officer should be disregarded as self-contradictory and that in any event he (the defendant) was justified in defending himself. The facts follow.

On June 24, 1966, Officers Sullivan and Kovacs of the Chicago Police Department were assigned to investigate the theft of a shotgun from 1422 East 67th Street, Chicago. After speaking to the victim, they set out to find Jeff Fort and one Gene Hairston who were allegedly involved in the theft. They found Fort, Hairston and three other youths sitting on a front porch at 1404 East Marquette Road, Chicago. They stopped their car in front of the building and were met by Hairston. They told him that they had a charge against him of involvement in the theft. Officer Sullivan directed the other men on the porch to come downstairs and when they did so, he told them of the nature of the investigation. Sullivan went upstairs, where the five young men had been, and found the stolen shotgun. He came down and informed all five men that they were under arrest. To this, the defendant replied, "Bullshit." That word, slang and vulgar, has a contemptuous and defiant connotation. (See Webster's Third New International Dictionary, unabridged, 1964.)

The youths were milling around the officers when the defendant directed that abusive, defiant remark to Officer Sullivan. Officer Kovacs testified that it seemed to him they were trying to take Jeff Fort from custody. Sullivan grabbed the defendant, who pushed and struck him. Kovacs testified that he saw the defendant thrashing and kicking and swinging his arms and that he was subdued by Officer Sullivan only with his aid and the aid of two other officers who had been summoned to the scene.

Defendant argues that the police officer was not justified in grabbing him; that the officer's actions amounted to an unprovoked attack; and that under the circumstances he was privileged to repel the attack. In furtherance of this argument he emphasizes some contradictions in the testimony of Officer Sullivan, particularly as to whether the officer seized the defendant before or after being struck by him. It is not necessary that the exact sequence of events be conclusively established in order to determine whether the defendant was guilty of resisting arrest. He admits struggling with the police, and we need only determine whether his physical resistance was in response to an unreasonable exercise of force by the officers.

The Criminal Code provides that:

> "A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest." (Ill. Rev. Stats., c. 38, § 7-5 (a) (1965).)

The arrest occurred in a tense situation. The officers had located a stolen shotgun and undertook to arrest five

young men for the offense, when the defendant responded with his abusive and defiant remark. This unquestionably aggravated the tension and gave the police reasonable cause to believe that force was required to maintain custody of the defendant. Struggling and fighting ensued and four officers were required to restore order.

Arrests frequently are made under hazardous conditions and the peace is best preserved when the citizen submits to arrest without regard to the merits of the case. (See, c. 38, § 7-7 Ill. Rev. Stats., (1965).) Our courts have gone to great length to preserve the individual's right to an impartial trial and trial by combat has long been outlawed.

The defendant was proven guilty beyond a reasonable doubt and the conviction is affirmed.

Judgment affirmed.

DEMPSEY, P. J. and SULLIVAN, J., concur.

UPREME COURT. U. S.

JAN 1 1 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 451

JEFF FORT,

Petitioner,

VS.

STATE OF ILLINOIS,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

MARSHALL PATNER
122 S. Michigan Avenue
Chicago, Illinois 60603

PAUL E. GOLDSTEIN
KENNETH G. JOHNSON and
ROSS, HARDIES, O'KEEFE, BABCOCK,
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List Of Authorities Cited

City v. Gregory, 39 Ill. 2d 47, 233 N.E. 2d 422 (1968).. 6

Civil Service Comm. v. Oratowski, 3 Ill. App. 2d 551, 122 N.E. 2d 146 (1954) 5

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Wright v. Georgia, 373 U.S. 284 (1963) 10

Aspen, Arrest and Arrest Alternatives: Recent Trends, 1966 U. of Ill. L. Forum 241 (1966) 8

In The

Supreme Court of the United States

October Term, 1968

No. 451

JEFF FORT,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

Introduction

Petitioner (defendant) presents this reply brief to show that review should be granted in this case, and to meet the State's Answer, because:

a. The construction placed on the resisting arrest statute by the Illinois Appellate Court is in conflict with the decision of a three judge federal court con-

struing the same statute, in conflict with decisions of this Court, and with the Fourth Amendment provisions prohibiting illegal seizure.

b. The construction by the Illinois Appellate Court, and in two decisions construing the same statute, by that court and by the Illinois Supreme Court, both subsequent to the filing of the petition for review in this case, are vague, and proscribe and punish exercise of conduct protected under the Fourth Amendment.

Alternatively, the only notice of the construction of the statute was subsequent to the conduct. This is no notice at all and *Winters* v. *New York,* 333 U.S. 507 (1947), if construed so as to give notice, should be overruled, and

c. The opinion upholding the conviction violated due process when the reviewing court

(i) reversed the chronological order of the facts in the record,

(ii) miscited a dictionary meaning of a dictionary definition of a relevant exclamation, and made factual conclusions contrary to the facts in the record, and

(iii) when the court relied on a statute not charged for its decision.

The State Has Not Overcome the Record; There Was No Cause to Use Force

Defendant seeks review where the Fourth Amendment prohibition against unreasonable seizures was violated and defendant convicted for "resisting arrest" when he was arrested by use of force (a) without probable cause for the arrest or (b) whether or not the arrest was on probable cause, but where there was no justification for the use of force to effect the arrest.

The State's Answer is that there is no right to resist either an illegal arrest or an illegal or unnecessary use of force, and the issue is clearly presented for review.(*) The use of facts by the State in its argument requires a reply—the facts do not sustain any ground for the use of force in the arrest of the defendant.

Defendant takes the position that the arrest was unlawful, and therefore that he had a right to defend himself from the use of force by Officer Sullivan. However, even if there was a lawful arrest, there was no basis to use force, the use of force was an unauthorized act, and defendant was entitled to defend himself, under the statute, Sec. 31-1, and under the Fourth Amendment.

Why did Officer Sullivan use force, i.e., grab the defendant to arrest him? The State gives several different answers, not necessarily consistent with the facts, but no answer that explains why Sullivan used force.

(*) As an afterthought, the State (S. Br. 21, 26), questions whether the issues raised here were raised below, and sets out defendant's brief to the Appellate Court (App. B) and Petition for Leave to Appeal to the Illinois Supreme Court (App. C). It appears throughout the case that defendant argued that the police officer had no right to grab him, (App. A, 39), (App. B, 47). Up to the time those documents were filed, Section 31-1 had not been construed, and the statute on its face prohibited resistance except to "unauthorized acts." Subsequently *Landry* v. *Daley, People* v. *Birnbaum,* and *People* v. *Young, infra,* reached various contradictory decisions of the construction of the statute. The State's reliance on *Zucht* v. *King,* 260 U.S. 174 (S. Br. 22, 26) is misplaced. That case applied only where no attempt to raise the question ever was made and the issue itself was waived.

Lack of any Showing of Probable Cause for Arrest, or any Showing Why Probable Cause Would Have Justified Use of Force

The State Does Not Make a Showing of Probable Cause

First, it is difficult for the State to say that there was probable cause to arrest, and the inference from the record goes the other way (S. Br. 18). The complainant was brought to the scene, but there was no effort to check the gun found there against the description in his complaint, or to allow him to see and determine whether or not it was his. Officer Sullivan found the gun, and in an instant announced the arrest. (The complainant appears never to have been heard from again). With the defendants all cooperating with the police, there was full opportunity to check and to meet the requirements of probable cause of the statute, Sec. 107(2) (c), or take no further action. Instead, the police made the arrest.

The trial court itself questioned whether the State had made a showing of probable cause (D. Br. 6-7; Trans. 25-26, 27). The Appellate Court, however *sua sponte,* found that there was probable cause to arrest. The State calls this error (S. Br. 23), but characterizes it as "mere harmless error." However, the State does not make out a case for probable cause for an arrest—let alone showing why probable cause would justify an arrest by force.

The State summarizes its position, based on its reading of the facts (S. Br. 15) on a second ground, a "contemplated" "threatened resistance":

> "The State unquestionably declares that the circumstances were such that a reasonable man could believe that a threatened resistance was being contemplated

and that Officer Sullivan's act in grabbing the defendant was justified."

To meet this imagined test—there was no basis for it in the trial court record as there was no testimony by Sullivan of any such belief of contemplation of a threat, let alone actual resistance—the State relies on defendant's exclamation when told he was under arrest (S. Br. 15):

> "Can it be said that there was a threatened resistance when Jeff Fort answered Officer Sullivan's announcement of arrest by saying 'Bullshit?'"

The State does not take issue with the holding of *Civil Service Comm.* v. *Oratowski,* 3 Ill. App. 2d 551, 123 N.E. 2d 146 (1954); actual swearing at a police officer is not grounds for arrest or use of force. In this case the defendant merely exclaimed "bullshit," commonly known to mean "you're kidding." Random House Dictionary of the English Language, unab., "bullshit . . . interj[ection]. 4. (used to express disbelief, disapproval, or the like)." The trial court seems to have taken no note of defendant's exclamation (unless he thought that swearing was worse than the actual fighting with the police by other defendants who were discharged by the court (D. Br. 9, Tr. 17). Yet the Appellate Court saw fit to read its own connotation of the term as one of "defiance" (App. 2a). (Citing Webster's which instead defines the word as talking nonsense), to justify the use of force.

However, earlier in their brief (S. Br. 10) the State, not following the Appellate Court had said:

> "It was not the one foul and vulgar word which the defendant uttered which held him open for conviction under this statute [Sec. 31-1]. It was that which followed, the pushing and hitting of the police officer (Rep. of Pro. 8)."

But how does that justify the fact that Sullivan grabbed Fort when Fort had done nothing but use a slang expression? Where in the record, let alone in law, is there any basis for use of force against a "contemplated" "threatened resistance?"

The Right to Arrest Does Not Mean Automatic Right to Use Force

It is the State's alternate position that if there was probable cause to arrest, there was automatically the right to use force (S. Br. 18):

> "The Statute [Sec. 7-5] expressly allows a police officer to use force which he reasonably believes to be necessary to effect the arrest . . ."

This is the statute that the Appellate Court found necessary to rely on even though that statute was never charged in the case.

On the facts here Officer Sullivan had no cause to use physical force, to grab the defendant even if there was cause for an arrest, under the circumstances—where the defendant had cooperated, had made no threatening gesture, and did no act of physical threat or toward escape—i.e., there was nothing justifying the use of force. See *City of Chicago* v. *Gregory,* 39 Ill. 2d 47, 233 N.E. 2d 422, (1968) (pending in this Court on other grounds, *sub nom, Gregory* v. *Chicago,* No. 60 Oct. Term, 1968). That case holds that the police, under similar circumstances, are obligated to explain, before making an arrest, and obviously it follows, to avoid the use of force if no force is necessary to effect an arrest. Even if Sec. 7-5 is read into Sec. 31-1, where in that statute does it give authority to a police officer to use force when no facts are present to justify the use of any force at all?

Subsequent Facts Cannot Justify Earlier Use of Force

The State attempts to justify the use of force by referring to facts which occurred after and as a result of the force used. The State says (S. Br. 15):

> "Can it be said under the circumstances of a milling crowd of four other men and who another officer said 'appeared to be trying to take Jeff Fort away from custody,' that Officer Sullivan's act in grabbing Jeff Fort was unjustified?"

This summary by the State is a summary of the facts reworked by the Illinois Appellate Court, and taken out of chronological order (S. Br. 11; Rep. of Pro. 8). However, what actually happened was that Sullivan announced "they were all under arrest" and Fort said "Bullshit." It was at this point that Officer Sullivan grabbed him. Only then, after he was grabbed, did Fort do anything, and then merely in reaction to being grabbed. The milling around, and belief of Officer Kovacs that there was an attempt to gain release of Fort then followed. And the record shows that prior to the time that Sullivan grabbed him, Fort and the other four young men all were peaceful and cooperative with the police. (State's Statement of Facts, (S. Br. 3; Rep. of Pro. 12, 7, 8)) and there was no cause to use force.

Any Force Is "Excessive" When No Force Is Justified

The State (S. Br. 16-17) quotes the Committee Comments to Sec. 7-7, a section also raised *sua sponte* by the Appellate Court (Opn., App. 3a). First, the Comments show (S. Br. 16) the Illinois' view through this Section that there is no right even to resist an illegal arrest, is not widely accepted:

> "While the rule as to resisting unlawful arrest usually is stated otherwise—for example, 'to constitute the offense of resisting an officer, it must be shown that the process is legal.'" (citing a string of authorities)

Second, the Comments show (S. Br. 17) that to resist excessive use of force is self-defense, not resisting, citing Sec. 7-1. If excessive force voids an arrest, so as to bar introduction of evidence seized during the arrest, Marvin E. Aspen,(*) *Arrest and Arrest Alternatives: Recent Trends,* 1966 U. of Ill. L. Forum 241 (1966), 247-248, III. *Force in Making an Arrest,* it necessarily follows that such force equally bars a conviction for resistance to the arrest.

The Construction Applied to Sec. 31-1 Violates the Fourth Amendment

The construction of the Illinois Statutes on the right to resist, basically dealing with Sec. 31-1, leave the conclusion that there is no right to resist any arrest. These cases are in conflict with the construction of Sec. 31-1 by a three judge federal court and in conflict with the Fourth Amendment and with the pronouncements of this Court.

Landry v. *Daley,* 280 F. Supp. 938 (three Judge Court, N.D. Ill., 1968.) In the *Landry* case the three judge court upheld the statute on the construction that it proscribed (pp. 959-960) "only resistance or obstruction of the legal acts of police and other officers. For instance, resistance to an illegal search and seizure would not be proscribed." (Quoted S. Br. 8).

(*) Member and draftsman of Joint Committee of the Illinois and Chicago Bar Associations to Draft the Criminal Code of 1961 and the Criminal Code of Procedure of 1963; Assistant Corporation Counsel, Chicago Law Department.

Since the time that the petition for review in this case was filed in this Court, Illinois has rendered two other decisions construing Sec. 31-1, *People* v. *Birnbaum* (Sept. '68. Set out in full, State's App. D., p. 56. Petition for rehearing pending.), and *People* v. *Young*, ... Ill. App. 2d ....., 241 N.E. 2d 587 (1968). Birnbaum was convicted of violation of Sec. 31-1. He did not dispute that he resisted when arrested while passing out leaflets. The Illinois Supreme Court, as in the present case, went to Sec. 7-5(a), denying any right to resist even an illegal arrest, in order to sustain the conviction (App. D, p. 62). In *People* v. *Young*, the Illinois Appellate Court in *dicta* came to the same conclusion. However, that Court upheld the right to resist an illegal search and seizure in a home (at pp. 589-590). To reach the conclusion the Appellate Court relied (p. 590) on Sec. 7-2, providing for a right to protect one's house. (The Court ignored Sec. 7-5(b) (Quoted, S. Br. 14)):

> "(b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid."

The Court (p. 589) specifically rejected the argument that an act of a police officer is made "authorized" if he believes or reasonably believes it to be so.

The law in Illinois as to Sec. 31-1, and the Fourth Amendment, therefore is now:

> Sec. 31-1, construed constitutional only because it allows defense or resistance against illegal arrest or search—valid, *Landry* v. *Daley, supra.*
>
> Sec. 31-1, construed so as to allow defense against illegal search of a house, putting property over person—*People* v. *Young, supra.*

> Sec. 31-1, construed so as to read in Sec. 7-5(a) and 7-7, prohibits resistance to any police use of force in an arrest—valid, *People* v. *Fort, People* v. *Birnbaum, People* v. *Young,* (dicta), *supra.*
>
> Yet, if the force used is excessive, Sec. 7-1, there is a right to resist or defend.

The state court decisions are in conflict with the construction of a three judge federal court in *Landry* v. *Daley, supra,* in the construction of the same statute, and conflict with the general holding of this Court in *Wright* v. *Georgia,* 373 U.S. 284 (1963), 291-292:

> "Obviously, . . . one cannot be punished for failing to obey the command of an officer if that command itself is violative of the Constitution."

And to the same point, *Shuttleworth* v. *Birmingham,* 382 U.S. 87 (1965), 92. These cases dealt with constitutionally protected rights, there under the First Amendment; here it is under the Fourth Amendment prohibition against illegal seizure.

The Construction of Sec. 31-1 Leaves the Statute Vague and Overbroad and Therefore It Is Void

Under these myriad, contradictory, and conflicting constructions of Sec. 31-1, the statute as construed is void for vagueness and overbreadth, for just as in the First Amendment cases, it both proscribes and punishes constitutionally protected conduct, here under the provisions of the Fourth Amendment.

Moreover, the only way that defendant can be charged with knowledge of the construction, or constructions, of the statute is by relating back any such construction to 1966. But even *Winters* v. *New York,* 333 U.S. 507 (1947) has never been stretched to reach so far, to pull in con-

structions in other cases, *Shuttlesworth* v. *Birmingham, ibid,* 92, or of different statutes not charged. *Cox* v. *Louisiana,* 379 U.S. 546 (1946), 556. *Winters* holds that a state court interpretation of a statute shall be binding on this Court. To the extent that doctrine says that such a construction has retroactive effect on the parties involved, i.e. to give notice retroactively of the construction of the statute, it does not appear to reconcile with the more recently developed doctrine of constitutional retroactivity, which is for the benefit, not the detriment, of the defendant, see *Reck* v. *Pate,* 367 U.S. 433 (1961), the *Mapp* v. *Ohio* question, and cases and commentaries following. But, if it is to be said that defendants did have notice under some interpretation of *Winters,* that notice was inadequate under established requirements of the Fifth Amendment, then *Winters* v. *New York* should be overruled.

CONCLUSION.

For the reasons set forth this Court should grant the petition for review and reverse the conviction below.

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SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 451

JEFF FORT,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

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THE COURT OVERLOOKED OR MISAPPREHENDED THE SCOPE AND IMPORTANCE OF THE GENERAL PROBLEM RAISED IN THIS CASE, WHERE LOWER COURTS ARE IN CONFLICT WITH THIS COURT AND WITH OTHER COURTS, AND WHERE THERE IS NO ADEQUATE REMEDY OR DETERRENT AGAINST EXCESSIVE USE OF FORCE BY THE POLICE.

A Recurring Institutionalized Problem which Requires the Attention of This Court

A 21-year old black in company with other ghetto youths upon being informed that he is under arrest re-

sponds with a mild obscenity, "bullshit". The arresting officer perceiving a "contemplated, threatened resistance" (the State's term) moves forceably against the defendant, makes a grab at him and, after a short scuffle, the defendant is subdued. The defendant is charged and convicted with resisting arrest. The underlying charge is dropped.

This scene is re-enacted daily upon the streets of our nation's black ghetto communities.

On one view

> "This is the arrest as a technique for summary punishment for an act of annoying, but not criminal, defiance—a group of young people walking down the street, a man an officer feels may look "suspicious", two men arguing on a street corner. The officer takes some action by way of asserting his authority, often ordering the individuals to move along or intervening in an argument or some similar act. Someone then does something the police officer construes as an actual or symbolic act of defiance. Then the policeman, almost subconsciously perceiving that his authority has been materially jeopardized, makes an arrest or treats the individual brutally or both, inventing a cover charge to justify the arrest and whatever else goes on in the incident. The individual is faced with the ominous prospect of criminal charges in which his story, if unauthenticated by independent witnesses, may be disbelieved and on which he may well be convicted." (Ronald M. Sohigan, "Police Abuses And Civil Liberties," *Book Week,* February 2, 1969, pp. 1, 10, a review of "Police Power: Police Abuses In New York City", Paul G. Chevigny. Pantheon.)

"The root cause of this unfortunate chain of events" we are told "is the combination of minor or almost subliminal acts of defiance of authority and the police-

man's somewhat rigid conception that he is the embodiment of authority in society. This self-conception is reenforced by police training, the extreme solidarity of the police force as an institution and society's attitudes which endow the police officer with this talismanic identity." (*id.*, p. 10)

The Kerner Commission would have it as the inevitable clash between the ghetto resident and the outside society from which he is alienated:

> "The policeman in the ghetto is a symbol not only of law, but of the entire system of law enforcement and criminal justice.
>
> "As such, he becomes the tangible target for grievances against shortcomings throughout that system: against assembly-line justice in teeming lower courts; against wide disparities in sentences; against antiquated corrections facilities; against the basic inequities imposed by the system on the poor—to whom, for example, the option of bail means only jail.
>
> "The policeman in the ghetto is a symbol of increasingly bitter social debate over law enforcement.
>
> "One side, disturbed and perplexed by sharp rises in crime and urban violence, exerts extreme pressure on police for tougher law enforcement. Another group, inflamed against police as agents of repression, tends toward defiance of what it regards as order maintained at the expense of justice.
>
> "The policeman in the ghetto is a symbol, finally, of a society from which many ghetto Negroes are increasingly alienated." (*Report of the National Advisory Commission on Civil Disorders,* Bantam Books, Ed., pp. 299-300)

In any event, whatever the cause, it is clear that this problem is in a very real sense institutionalized and one

which will be with us for some time to come and which because it involves important individual rights and social interests requires the attention of this Court.

On a basic and, indeed, sufficient level, there is involved the invasion of important individual rights: Unless the use of force is justified, defendant's person is assaulted without cause and his liberty is suspended as a cover for the unjustified force.

On a somewhat broader level there is involved the interests of society in general, because actions of this type sow the seeds of disorder:

> "In assessing the impact of police misconduct we emphasize that the improper acts of a relatively few officers may create severe tensions between the department and the entire Negro community. Whatever the actual extent of such conduct, we concur in the Crime Commission's conclusion that:
> ". . . all such behavior is obviously and totally reprehensible, and when it is directed against minority-group citizens it is particularly likely to lead, for quite obvious reasons, to bitterness in the community." (*Report of the National Advisory Commission on Civil Disorders,* Bantam Books, Ed., p. 304)
>
> "We found that violence was generated by an increasingly disturbed social atmosphere, in which typically not one, but a series of incidents occurred over a period of weeks or months prior to the outbreak of disorders. Most cities had three or more such incidents; Houston had 10 over a five-month period. These earlier or prior incidents were linked in the minds of many Negroes to the pre-existing reservoir of underlying grievances. With each such incident, frustration and tension grew until at some point a final incident, often similar to the incidents

preceding it, occurred and was followed almost immediately by violence.

"As we see it, the prior incidents and the reservoir of underlying grievances contributed to a cumulative process of mounting tension that spilled over into violence when the final incident occurred. In this sense the entire chain—the grievances, the series of prior tension-heightening incidents, and the final incident—was the 'precipitant' of disorder." (Footnote omitted—*Ibid*)

On still another level, and perhaps most important of all, there is involved the relationship between the citizen and the law, and specifically his respect for the courts:

"It is a sorry commentary on our society that this sort of behavior goes on. But much worse is that this pattern culminates in criminal litigation in which the courts become, in effect, contaminated by being made a party to the efforts of the police to vindicate real or imagined slights of their authority." (Ronald M. Sohigian, "Police Abuses And Civil Liberties," *Book Week,* February 2, 1969, *infra,* p. 10)

The present case is only one instance, but a clear one, where the police use force where force is not required or justified—where it is police action that causes the trouble. The policeman grabbed the defendant. Why? To effect the arrest? There was no showing that force was called for. Because the defendant swore once? Illinois had followed the rule, 12 A.L.R. 2d 971, 922:

"The courts almost invariably recognize and follow the general rule that words alone do not constitute an assault."

In *Civil Service Commission* v. *Oratwoski,* 123 N.E. 2d 146 (Ill. App. 1954), the court, p. 151 held:

> "An officer of the law must exercise the greatest degree of restraint in dealing with the public. He must not conceive that every threatening or insulting word, gesture, or motion amounts to disorderly conduct. It may be of such a character or so provoked or conditioned as to be fully justified. *City of Jacksonville* v. *Headen,* 48 Ill. App. 60; *Pinkerton* v. *Verberg,* 78 Mich. 573, 44 N.W. 579, 7 L.R.A. 507; *Heath* v. *Hagan,* 135 Iowa 495, 113 N.W. 342. A municipality has no authority to clothe any officer with autocratic power to order the summary arrest and incarceration of a citizen without warrant or process of law. If the municipality could, it would render the liberty of everyone of its citizens subject to the arbitrary whim of a police officer. *People* v. *McGurn,* 341 Ill. 632, 638, 173 N.E. 754.
>
> "It is apparent from this statement of the law that words addressed to an officer in an insolent manner do not without any other overt act tend to breach the peace because it is the sworn duty and obligation of the officer not to breach the peace and beyond this to conduct himself so as to keep others from so doing. He has an obligation to exercise a great degree of restraint in dealing with the public and should not permit abusive statements to so arouse him that he will commit a breach of the peace. This Oratowski did not do. He allowed Koprowski's remarks to arouse his ire and made an arrest for a fancied insult which was not in violation of the law."

In that case (p. 150) the police officer gave a traffic ticket to a man who complained to him about it, and who claimed that police officers could park illegally with impunity, while ordinary citizens were ticketed. He threat-

ened to report the officers. One officer placed him under arrest, for disorderly conduct, and reached for his arm. The man knocked the officer's hand away. The officers then forced him into a squad car, subdued him and beat him.

Although the proceedings to discharge the offending police officer are rare, (Report of National Advisory Commission, *supra,* p. 310) the incident itself is not uncommon. See the Appendix to this petition, setting out one, out of many, newspaper reports on police overaction. It is incidents like these, like the one in Detroit which triggered the riot there, which must be considered in the broadest context, and faced and resolved by the courts. But the state of the law is in confusion. There are conflicts between federal and state court decisions on the general issue. The statute involved here has been construed by a federal court to allow for resistance to an illegal arrest, but the same statute has been construed otherwise by two Illinois courts. These latter decisions are in apparent conflict with prior holdings of this Court.

This Court Should Grant Review to Resolve the Conflict Between State and Federal Decisions and the Apparent Conflict of This Case with Prior Decisions of This Court.

Why did the officer use force in this case? To effect the arrest? That argument cannot be supported by the record and it was not argued by the State. Because defendant swore once?* As set out above, under Illinois law and the common law generally, swearing to a

* Defendant argued below that the police officer grabbed him before he retorted with a common swear word of incredulity. That question was never resolved by the Appellate Court. Defendant did not rely on that factual argument here. Instead, he presented the broad issues for consideration by this Court.

police officer is neither an assault nor grounds for the use of force by the police. Yet the defendant was convicted where the record merely shows that he swung back once when he was grabbed, without cause, to be handcuffed behind his back. The Appellate Court justified the use of force on the ground that defendant had been "defiant". This could only be because defendant swore.

The decision below is in conflict with the general common law, and the interpretation that the Illinois courts have given to the state resisting arrest statute, is in conflict with prior decisions of this Court and with a decision of a federal three judge court.

Justice Jackson, for the Court, said in *United States* v. *Di Re,* 332 U.S. 581 (1948), 584:

> "One has an undoubted right to resist an unlawful arrest and courts will uphold the right of resistance in a proper case."

The *Di Re* case followed the holding of *John Bad Elk* v. *United States,* 177 U.S. 529 (1900). This is the general law of the states, "The right to resist an unlawful arrest is recognized in 45 of the 50 states." 3 Tulsa L.J. 40 (1966), 46, and the federal courts, see *Stepp* v. *United States,* 4 Cir., 1953, 207 F. 2d 909 911, relying on *Grau* v. *Forge* 209 S.W. 369 (Ky., 1919), 372, 3 A.L.R. 642, 646:

> "It is a well known principle of law that insulting words furnish no defense for an assault and battery."

This is consistent with prior Illinois law, *Oratowski, supra,* and it follows that words do not give ground for the use of force in making an arrest where no force is

required or justified.* In the *Landry* case (Reply br. pp. 8, 9) a three-judge federal court construed the Illinois resisting arrest statute and held that it allowed resistance to an illegal use of force. But in the present case, and in the *Birnbaum* case (Reply br. p. 9), the Illinois Courts have gone the opposite way. And in doing so, those decisions have relied on a statute prohibiting such resistance even though that statute was not charged (the State contends (St. Br. p. 20) Section 7-7(a) does contain a penalty. Therefore that section could have been charged). These decisions are in conflict with the *Landry* case and with the holdings of this Court and with the provisions of the Fourth Amendment. This Court should grant review and reverse the decision below, and hold that illegal police action will bar a conviction for resisting arrest.

Holding that Illegal Use of Force by the Police Will Bar a Conviction for Resisting Arrest Will Deter Illegal Police Action Where No Other Deterrent Has Been Effective.

As set out in the introduction to this petition, excessive use of force by the police can be destructive to the individual and to society. Yet to date there has not been any effective deterrent against such action.

---

* The record here does not show, and the State does not claim, that defendant resisted after he was in custody. This is consistent with the limitations placed on the right to resist an illegal arrest or illegal use of force, *People* v. *McNeil*, 247 N.Y.S. 734 (1964), 736:

> ". . . an illegal arrest may properly be resisted but it does not clothe the one wrongfully detained with the right to continue indefinitely an assaultive course of action."

As set out below, if the arrest was illegal the State should be barred from convicting on resisting arrest—(within the limitations set out in the *McNeil* case).

> "Civil suits for damages filed against the individual officer have not proved adequately effective in preventing police abuse of authority." O. W. Wilson (former police commissioner of Chicago), *Police Arrest Privileges In a Free Society: Plea for Modernization,* 51 Crim. L. C. & P.S. 395, 400.

And criminal sanctions against police officers have not been successful as a deterrent, Caleb Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 Minn. L. Rev. 493 (1955), (noting that police and prosecutors do not punish themselves).

If this Court holds that illegal use of force will bar a conviction for resisting arrest, there will be an effective deterrent, under the law.

CONCLUSION.

Defendant has set out in the petition, the reply, and in this petition for rehearing, the grounds for allowing the writ to issue. This case raises issues of constitutional law and a decision of this Court is essential to the rights of individual citizens, to the fair administration of criminal justice, and the issue is timely and most important in citizen-police relations, particularly in our

ghetto communities. Police restraint, while in the performance of lawful duties, is necessary. It will take the decision of this Court to make that clear throughout the land.

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APPENDIX

CHICAGO DAILY NEWS
January 22, 1969

BY: MIKE ROYKO

The strong-arm of the law

One of the fascinations of the big city is that a person never knows when something exciting will happen to him.

If we knew in advance, it would ruin everything because we would all be hiding.

Take the case of a rather ordinary man named William Bamborough, 34, a balding, bespectacled, pudgy insurance man.

One night recently his orderly life suddenly got so exciting he didn't know what hit him.

He And His Wife were on their way home from an evening spent with some friends.

It was well after midnight when Bamborough pulled into a private lot near his apartment at 421 W. St. James Pl., on the mid-North Side.

Bamborough's rented space was filled. So were all the other spaces in the lot. Nothing gets a big-city man as angry as someone filching his private parking space.

Figuring the space-grabber was in a nearby building, Bamborough went looking. His wife, Rae Ellen, a suburban schoolteacher, waited in the car.

Bamborough found a clue. Behind an apartment door there were the sounds of laughter, music, and chatter. At 2 a.m., Bamborough figured, that's where the car owner was.

He Rapped On The Door and said that if the owner of the car was there, he had better come out and move it.

He recalls that he referred to the person as an "irresponsible hippy-dippy."

(Appendix)

The door opened and a girl said the car belonged to a cop who was at her party.

"I said that policeman or not, it didn't belong there," Bamborough said.

Whatever Bamborough said, that's when life got exciting for him.

He said a young man burst out of the apartment waving a badge, shouting, and began banging him around.

Bamborough said his role in the brief brawl was that of the target.

"He Pushed Me Down and started kicking. He kicked me in the head. Everything became a blur. I heard him yell, 'I'm going to kill this S.O.B.'

"Somebody yelled 'You'll kill him, stop it.' I just lay there nice and still. I was afraid he might do it."

Somebody at the party called the cops and in a few minutes two uniformed men arrived.

Mrs. Bamborough was surprised to see her husband being taken out of the building by two policemen.

He appeared to have trouble walking and one of the policemen kept repeating:

"Boy, is he stiff."

Since he hadn't been that stiff a little while ago, Mrs. Bamborough asked how he got that stiff.

A Policeman Politely Told Her that the mister had been pinched for disorderly conduct and assaulting a cop.

She drove to the Town Hall station but by then her husband had been taken to the American Hospital because he had insisted on fainting and vomiting.

She also discovered that the charges had been placed against her husband by policeman Gary Cohen, who was the young man at the party.

Officer Cohen was off duty, of course, but a policeman's work is never done.

The police records show that Cohen arrested Bamborough for "causing a disturbance in a hallway . . . and then striking a police officer with his hands, forcing officer to use reasonable force to subdue offender."

(Appendix)

Bamborough was transferred to Passavant Memorial Hospital, where he underwent emergency surgery for a ruptured spleen.

It isn't considered easy to rupture a spleen. Doctors say it takes a powerful blow to exactly the right spot. A ruptured spleen is a rarity in such violent sports as pro football or prizefighting.

Bamborough Was Lucky that policeman Cohen used only "reasonable force" in that hallway.

Had he used "unreasonable" force, Bamborough might still be bouncing.

The surgery was a success and Bamborough will survive, his doctors say.

But this new exciting chapter in his life is not over yet.

In a couple of weeks, if he's able to get around, Bamborough will go to court to stand trial for allegedly committing "battery" upon off-duty policeman Cohen.

Cohen appears healthy after his experience. But he is modest about discussing the details of his thrilling hallway arrest.

Cohen said only:

"I have no comment whatsoever to make at this time."